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CIVIL AND POLITICAL RIGHTS

The incompatibility between democracy and racism

Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/43

I. INTRODUCTION

1. The present report is submitted pursuant to Commission on Human Rights resolution 2001/43, in which the Commission invited the High Commissioner for Human Rights to present to the Commission at its fifty-eighth session an analytical report on the main trends and governmental policies regarding the incompatibility between democracy and racism, especially on the development process of political parties with racist platforms, as well as actions to counter such trends.

2. The report contains three main sections. Part I explores the relationship between democracy and racism, racial discrimination, xenophobia and related intolerance. It first looks at democracy as a fundamental value which may be challenged by racism, racial discrimination, xenophobia and related intolerance. It then briefly deals with the need to protect and strengthen democracy in order to combat racism and related intolerance, and examines the legal framework protecting and promoting democracy against racism. Part II broadly identifies current trends in racism, xenophobia and related intolerance which threaten democracy, and includes a subsection on political parties with racist platforms. Part III looks at actions to counter the negative impacts of racism on democracy.

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3. The Office of the High Commissioner for Human Rights received five responses to its request to Governments for information concerning the subject of the report. Information contained therein is reflected in Part III of this report. The full text of all replies can be consulted in the files of the secretariat.

II. THE RELATIONSHIP BETWEEN DEMOCRACY AND RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

A. Democracy as a fundamental value which may be challenged by and needs to be protected against racism

4. Democracy is commonly recognized as a basic form of organization of contemporary societies and as one of the fundamental values of modern times. Its underlying principle is the recognition of the equal dignity and worth of every human being. The 1993 World Conference on Human Rights linked democracy with other basic values and stated that "[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives". The interpretation of the other values as human-centred development and as universal, indivisible, interdependent and interrelated human rights leaves no doubt that the World Conference spoke on a substantive and not only formal concept of democracy. The Human Development Report 2000 reflects, notably in chapter 3, a widely supported view that democracy is the only form of political order in the framework of which all human rights could be guaranteed.[1] The 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance reiterated that democracy is essential for the effective prevention and elimination of racism and related intolerance.

5. The Commission on Human Rights has reaffirmed that, while there is no one universal model of democracy, popular participation, equity, social justice and non-discrimination are democracy's essential foundations. It stressed that the consolidation of democracy requires the promotion and protection of all civil, cultural, economic, political and social rights, including the right to development, sustained economic growth and sustainable development of countries and communities. The Commission has called on States to strengthen democracy, inter alia through promoting pluralism and the participation of individuals in decision-making, developing competent public institutions, including an independent judiciary and effective and accountable legislature and public service, and developing an electoral system which ensures periodic, free and fair elections. Further, it called on States to foster a democracy that promotes people's welfare, rejecting all forms of discrimination and exclusion, strengthens good governance practices, and enhances social cohesion and solidarity.[2]

6. Substantive democracy, as the Commission on Human Rights sees it, needs to be based on human rights and fundamental freedoms for all human beings. Otherwise, it would be reduced to formal processes and techniques. While democracy is premissed on inclusion, participation and choice, racism and xenophobia restrict, discriminate and exclude. Democracy is based on accountability and responsibility of all involved while racism and xenophobia are defined by arbitrariness and contempt for others. All of the basic manifestations of racism and

xenophobia are incompatible with democracy because they essentially contradict equal dignity of people, equal participation in community life and equal protection of human rights. They disenfranchise individuals and groups and, by their very nature, threaten democratic values and the democratic fabric of society, destabilizing relations amongst individuals and groups.[3]

7. Democracy, as one of the basic values of contemporary societies, needs to be protected against racism and xenophobia, which challenge its core content. By the same token, democracy needs to be recognized as one of the fundamental tools for countering these evils.

B. Strengthening democracy as an effective tool to combat racism

8. To fulfil its promise, democracy must be inclusive. Its mechanisms and procedures need to fully incorporate women, minorities, indigenous peoples, migrant workers and other groups whose rights and interests require promotion and protection. The Human Development Report 2000 distinguished two broad models of democracy - majoritarian and inclusive - and explored why inclusive democracy is more conducive to promoting and protecting human rights than democracy narrowed to majoritarian rule. This is mainly due to the fact that many minorities in pluralistic societies find themselves permanently excluded because of their limited ability to impact on the electoral prospects of majority-based political parties. As a consequence, it happens that tensions or even open conflicts sometimes become a characteristic of societies that hold elections and follow other democratic procedures. This is a new manifestation of the classical dilemma "majority rule versus minority rights", the resolution of which consists in the combination of the democratic process of decision-making, respect of the rights of persons belonging to minorities, and policies ensuring an inclusive organization of society.

9. Inclusive democracies, based on mutual respect and tolerance, are a vehicle for societies to effectively resist racism and xenophobia. They are essential in this respect precisely because these scourges often result from discrimination, exclusion and marginalization. Inclusive democracies are premissed on the principles of participation and power sharing, on recognizing and respecting diversity, on including minorities in democratic processes and institutions, and on the rule of law. They create the space and procedures for the protection of all parts of society. Finally, they incorporate human rights in social and economic policy-making and thus help to address destructive inequalities in different areas of life.

10. Since the 1993 World Conference on Human Rights, the international community has paid increasing attention to democracy as a guarantor of human rights and development. Most recently, in the Millennium Declaration States pledged to promote democracy and strengthen the rule of law, and to strengthen the capacity of all countries to implement the principles and practices of democracy and respect for human rights. The work of the Commission on Human Rights has contributed to a wider understanding of the various elements of democracy and its interdependence with human rights. Commission resolutions 2000/47, "Promoting and consolidating democracy" and 2001/36, "Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy" together provide a broad roadmap of principles and practices to strengthen democracy.

C. Legal framework protecting and promoting democracy against racism

11. All of the basic elements of democracy are protected by the international human rights standards, and non-discrimination is an overarching principle in international law. According to Article 1, paragraph 3, of the Charter of the United Nations, one of the main purposes of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". The Universal Declaration of Human Rights states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This principle is also common to each of the core international human rights treaties.

12. Article 21 of the Universal Declaration sets the basis for a democratic order by declaring that the will of the people shall be the basis of the authority of government, expressed through genuine and periodic elections. It proclaims the right to take part in government and to equal access to public service. Article 25 of the International Covenant on Civil and Political Rights guarantees the right of every citizen, without any of the distinctions mentioned in article 2 of the Covenant, to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections, and to have access to public service.[4] Other rights essential for political participation - freedom of opinion and expression, the right to peaceful assembly and association, and freedom of thought, conscience and religion - are also protected by the Universal Declaration and the International Covenant on Civil and Political Rights (ICCPR).[5] They should inter alia allow for the free promotion of political programmes and ideas, the manifestation of an individual's own convictions, and the mobilization of social support. Effective political participation in the conduct of public affairs requires the free flow of information and ideas among citizens, candidates and elected officials. Democratic practice is grounded in the protection and exercise of human rights and fundamental freedoms.

13. Does this mean, however, that the promotion of racist ideas should be protected in the framework of a democratic order and its underlying human rights standards? Should the protection of democratic freedoms prevail over the need to effectively counter public dissemination of racist ideas? Although these questions sound rhetorical, they pose a real dilemma in the view of many. The law in several countries does not prohibit organizations or the publication of materials promoting racist ideas. Moreover, reports submitted to treaty-monitoring bodies indicate that some Governments refer to the incompatibility with certain fundamental freedoms of bans on movements based on racist concepts or prohibitions of the promotion of such concepts. However, the provisions of the Universal Declaration and the International Covenant on Civil and Political Rights allow for limitations to be imposed on some human rights, which are also relevant in the context being discussed, if this is necessary to protect the legitimate interests of society or the human rights of other persons.[6] In the context of countering racism international law goes even further, establishing the clear responsibility of States to take appropriate action, including the prohibition of some activities. The International Convention on the Elimination of All Forms of Racial Discrimination, which has been ratified by 161 countries, clearly imposes on the States parties the obligation to condemn "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to

eradicate all incitement to, or acts of, such discrimination" (art. 4). The Convention further demands that the States parties "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof"(art. 4 (a)). The States parties should "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law" (art. 4 (b)).

14. The Committee on the Elimination of Racial Discrimination in its general recommendations VII and XV reiterated that these provisions are of a mandatory character. Under these provisions, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. The Committee recalled that article 4 of the Convention requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts. The Committee also clearly stated that in its opinion, "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression".[7] The Committee drew the attention of States parties to article 20 of the ICCPR, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the context of the view of some States that in their legal order it is inappropriate to declare illegal an organization before its members have promoted or incited racial discrimination, the Committee reiterated its position that such "organizations, as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished".[8]

15. The International Covenant on Civil and Political Rights, in article 20, paragraph 2, lays down that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". In its general comment No. 11, the Human Rights Committee takes the same approach as the Committee on the Elimination of Racial Discrimination by saying that prohibitions required by article 20 "are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities ...". In the view of the Committee, article 20 (2) "is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. ... For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation".

16. Finally, it must be stressed that the participants in the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Durban recalled that "the dissemination of all ideas based upon racial superiority or hatred shall be declared an offence punishable by law with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination".[9]

17. In view of the above, democratic rights and freedoms cannot justifiably be invoked to protect dissemination of ideas based on racial superiority or hatred since these ideas engender harm and negatively impact on the human rights and freedoms of the individuals or groups against whom they are directed. Although political platforms are central to electoral processes, platforms based on racist and xenophobic ideas are incompatible with democracy because they challenge what democracy aims to protect - the dignity and worth of the human person, and the rights and freedoms of individuals and groups. Even in democratic societies, politicians and political parties cannot be said to remain within a democratic framework if they endeavour to win votes by demonizing a section of the population or if their platforms are based on dehumanizing ideals.

III. CURRENT TRENDS IN RACISM, XENOPHOBIA AND RELATED INTOLERANCE WHICH THREATEN DEMOCRACY

A. Scale, contemporary manifestations and dynamics of the problem

18. Notwithstanding that non-discrimination is a fundamental principle of international law, discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, or other status persists in almost every country in the world. Over the last five years, the reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have looked at occurrences of racism, racial discrimination, xenophobia and related intolerance against Blacks, Arabs, Muslims, Jews, Roma, immigrants and migrant workers. The Special Rapporteur has paid particular attention to the activities of neo-Nazi and skinhead organizations, and to the use of the Internet as a means to disseminate and incite racial hatred.[10] He has identified certain recurring situations which are incompatible with democracy. His reports focus in particular on racist attitudes and negative stereotyping of certain groups which lead to their exclusion and marginalization, and contribute to and perpetuate inequalities in general. Members of the affected groups are specially vulnerable to violations of their personal security and to discrimination in the administration of justice. They also suffer discrimination in housing, education and employment and are the subjects of defamation in the media and the objects of hatred on the Internet. The Special Rapporteur has identified continuing instances of religious intolerance, including the destruction of religious symbols and places of worship. He has noted that it is difficult to separate acts of racial discrimination from acts of religious intolerance, as each may reinforce or encourage the other. Regarding immigrants and migrant workers, the Special Rapporteur has stated that all over the world, immigrants have become easy scapegoats and sacrificial victims of economic crises or insecurity. They are often held responsible for all the ills in society. In some cases, they are subjected to harsh legislative and institutional difficulties in addition to racist and xenophobic remarks and acts.

19. The Special Rapporteur has continuously drawn attention to numerous occurrences of racist and xenophobic propaganda on the Internet. It will be recalled that the Seminar on the role of the Internet with regard to the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, organized by OHCHR in 1997 in the framework of the Third Decade to Combat Racism and Racial Discrimination, acknowledged that the major challenge for the international community today is how to avoid restrictions on the freedom of expression, while continuing to provide proper legal protection to the rights of groups and

individuals who are affected by the increasing dissemination of racist and xenophobic material on the Internet. During one of the five regional expert seminars in preparation for the Durban World Conference, organized by OHCHR, it was noted that in some countries racist and hate speech are protected by the right to freedom of speech and are therefore allowed to be posted on the Internet. In other countries, even though hate speech is regarded as a criminal offence, it is not possible for the perpetrators to be prosecuted since the web postings originate from countries which do not forbid it and the perpetrators benefit from legal provisions guaranteeing freedom of speech. The decentralized nature of the Internet makes it difficult to eliminate such activities.

20. The aforementioned regional expert seminars had the overarching theme of "Trends, priorities, and obstacles in combating racism and racial discrimination". The reports of the seminars reveal disturbing trends in each of the host regions, which relate variously to discrimination against indigenous communities, minorities, migrants, refugees and asylum-seekers. In several of the expert seminars, discrimination against migrants was of particular concern. In addition, discrimination on the basis of race, ethnicity, social and economic status, religion and political status are present to varying degrees in each of these regions.[11]

B. The case of political parties with racist platforms

21. Political parties bear particular responsibility for strengthening democracy and countering threats to it, including racism. Pursuant to Commission resolution 2000/14, the Special Rapporteur prepared a study on the issue of political platforms which promote or incite racial discrimination.[12] In the study, the Special Rapporteur noted that during the last decade, extreme-right, racist political parties and organizations have become increasingly popular and influential in several parts of the world.[13] In the view of the Special Rapporteur, their increased popularity is attributable to economic problems, globalization and immigration. In some cases, in order to attract voters who are fearful of losing their status in society, extreme-right parties portray immigrant and minority populations as opportunists who drain welfare and are incapable of integration. In other cases, political parties base their ideology on neo-Nazism, ultranationalism and racial superiority. Indigenous populations, immigrants and refugees have all been targets of negative political speech and multiculturalism is often portrayed as a threat rather than a benefit to the societies concerned.

22. The Special Rapporteur noted that international law is clear on the need to prohibit organizations that incite racial hatred. He pointed out that despite the clarity of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, many States parties have made declarations and entered reservations with respect to it, in effect limiting its implementation at the national level.[14] The Special Rapporteur reiterated that a refusal to prohibit organizations and political parties that practise incitement to racial discrimination is no argument for democracy, but, quite the contrary, creates a democratic paradox by protecting organizations that frequently endanger the very foundations of democracy.

23. The Durban World Conference expressed concern that racial and xenophobic programmes are regaining political, moral and even legal recognition in many ways, including through some political parties and organizations. It condemned political platforms and organizations based on racism or xenophobia as incompatible with democratic, transparent and

accountable governance. The Conference also reaffirmed that racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights and may endanger friendly relations among peoples, cooperation among nations, and international peace and security.

24. The Conference underlined the key role that politicians can play in combating the scourges of racism, xenophobia and related intolerance. It encouraged political parties to take concrete steps to promote equality, solidarity and non-discrimination. It is in the spirit of this Conference to stress that politicians have the responsibility to refrain from making provocative remarks that could lead to racial or other discrimination. They cannot justifiably capitalize on racist or xenophobic trends in public opinion or society for electoral gain, and cannot legitimately be said to be upholding the ideals of democracy if they ostracize or demonize vulnerable groups. On the other hand, they have a positive obligation to make strong public statements against racist, xenophobic and related intolerance since silence on their part creates a vacuum in which racism and related intolerance can fester. The Conference called on political parties and organizations to develop voluntary codes of conduct, accompanied by internal disciplinary measures for violations, to discourage members of political parties from making public statements and engaging in actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance.

IV. ACTIONS TO COUNTER THE NEGATIVE IMPACTS ON DEMOCRACY OF RACISM, XENOPHOBIA AND RELATED INTOLERANCE

A. Steps at the country level to counter racism, xenophobia and related intolerance

25. The Government of Argentina reported that as a result of the 1994 constitutional reform, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was accorded constitutional rank and therefore takes precedence over other international treaties without such status and over national and provincial legislation. Several decisions of the Supreme Court had confirmed this legal superiority. A 1995 act created the National Institute against Discrimination, Xenophobia and Racism to prepare national policies and specific actions to combat these phenomena. The State had also submitted all reports due to the Committee on the Elimination of Racial Discrimination and the declaration under article 14 of the Convention permitting individual communications, was being prepared. The Constitution provides for political parties to act freely but with respect for the provisions of the Constitution and thus of the main international human rights instruments, including ICERD. Article 4 of ICERD had become enforceable in November 1988 when a law imposing penalties on illegal and criminal acts which incite discrimination was adopted. This law was incorporated into the Penal Code and binds all individuals and organizations, including political parties. Article 3 of the 1988 law provides penalties ranging from one month to three years of imprisonment for persons belonging to organizations which or who engage in propaganda based on ideas or theories of racial or other superiority aimed at justifying or promoting racial and religious discrimination. The same penalty is applicable to those who encourage or incite persecution or hatred on racial, religious or other grounds.

26. The Government of Cuba noted that it attaches particular importance to the implementation of Commission resolution 2001/43 in the firm belief that democracy and racism are totally incompatible. The process of political and socio-economic change since 1959 has deep anti-racist roots. The right of all persons to equality before the law and in the enjoyment of their rights is guaranteed by the Constitution and laws, and must be respected by all State and public authorities. Racial discrimination in all forms is prohibited. The Criminal Code makes discrimination or the promotion or incitement of discrimination based on sex, race, colour or national origin punishable by imprisonment or fine. This includes disseminating ideas based on racial superiority or hatred or incitement to acts of violence against any race or group of persons of another colour or ethnic origin. The Associations Act (No. 54), governing the exercise of the right of association, forbids the establishment of racist or segregationist associations. Only associations whose objectives are compatible with the principles of friendship, solidarity and equality among human beings will be authorized. The Criminal Code punishes offences against freedom of opinion, freedom of worship, and against the rights of assembly and association and the right to demonstrate. Access to social services, including education and health, is guaranteed to all citizens without discrimination or restriction of any kind. Teaching, education, culture and information are aimed at building friendship and solidarity between individuals and peoples. In addition, the response of the Government of Cuba also addresses the international dimensions of combating racism, racial discrimination, xenophobia and related intolerance and examine some obstacles that are apparent at that level. Commenting on important steps to consolidate democracy and eradicate racism, the reply refers to a new economic order; universal ratification of the International Convention on the Elimination of All Forms of Racial Discrimination; withdrawal of reservations to article 4 of the Convention and consolidation of the universal prohibition of racist propaganda and associations; and development of positive discrimination programmes to the benefit of vulnerable groups.

27. The Government of Georgia explained that the establishment and activities of political parties in Georgia are regulated by the Basic Law on Political Union of Citizens. The right to membership of the political parties existing in Georgia is reserved for Georgian citizens (articles 5 and 8 of the Law) and has no restrictions on the basis of race (art. 11). According to the Law, the formation and activities of a party whose goal is, inter alia, to advocate war and violence or arouse national, local, religious or social enmity shall be prohibited (art. 5). Only the Constitutional Court can prohibit a party (art. 35). In accordance with the Law on the Constitutional Court, the President of Georgia, not less than one fifth of the members of the Georgian Parliament, and the supreme state bodies of Abkhazia and Adjara have the right to submit a request for the prohibition of a party (art. 35). The Government of Georgia stated that additional information relating to the question under discussion may be found in the initial report of Georgia on the implementation of ICERD (CERD/C/369/Add.1, paras. 182, 186 and 189).

28. The Government of Guatemala reported on steps taken in the field of education, participation, and human and social development. The State had initiated a process of educational reform aiming to eradicate the discriminatory contents, strengthen and promote bilingual and intercultural education, and incorporate contents which favour national unity and respect for cultural diversity. There is a bill before the Congress for the reform of the law on the electoral system and political parties. This reform will lay the groundwork for major social and political participation by certain sectors of the society, such as the indigenous population who are traditionally excluded from the decision-making process. Another bill aims at the reform of the

national system of Councils for Rural and Urban Development. In this regard, the new Law on Development Councils, to be approved by the Congress, includes elements aiming at, inter alia, significant involvement of the population, including indigenous groups, in the design and implementation of development programmes; the recognition of the multicultural and multilingual reality of Guatemala; and the effective participation of local communities in the design, prioritization and resolution of problems. New laws to reform the Municipal Code and the Law on Community Communication, expected to come into force during 2002, include provisions for strengthening the participation of indigenous groups at the municipal level, and their contribution to development, democracy and a culture of peace.

29. The Government of Turkey stated that the principle of respect for human rights is among the fundamental characteristics of the Republic of Turkey. Article 10 of the Constitution guarantees to all individuals equality before the law, without discrimination on any basis. Further, no privilege can be granted to any individual, family, group or class. Political parties are regulated by law according to the relevant provisions of the Constitution. According to articles 68 and 69, political parties shall not conflict with, inter alia, the independence of the State, human rights, the principles of equality and the rule of law, and shall not aim to protect or establish any form of dictatorship, nor to incite citizens to crime. The Constitutional Court can decide to dissolve political parties when it is established that these provisions have been violated. The activities, internal regulations and operation of political parties must be in line with democratic principles. According to the law on political parties, they shall not have racist aims nor conduct activities to that end, or be in conflict with the principle of equality before the law. The Penal Code provides that those who incite people to hatred and enmity on the grounds of class, race, religion and sect, or regional difference shall be punished.

30. The Committee on the Elimination of Racial Discrimination, in recent concluding observations on States parties' reports, has pointed to several instances where international instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination, form part of or take precedence over domestic law, and can be invoked directly before the courts. The Committee has also pointed to the establishment of various institutions and programmes for the promotion and protection of human rights. Regarding implementation of article 4 of the Convention, the Committee has noted several instances when States parties have taken positive actions. In one case, the Committee noted that following actions by a State party, more extreme right-wing associations had been banned. It noted that measures taken by the same State party to combat racial propaganda were being effectively implemented, leading to the conviction by judicial authorities of approximately 900 people in a particular year. In another instance, a State party was commended for the amendment of its Criminal Code making racial discrimination a specific crime. In yet another case, the Committee expressed satisfaction at the amendment of a certain law criminalizing acts mentioned in article 4 of the Convention; as a result of this amendment, it was no longer necessary for incitement to racial hatred to be intentional in order for the offence to be committed. The Committee cited as a positive aspect a number of provisions in the domestic legislation of another State party, in particular specific articles of the Constitution and Criminal Code, and the provisions of the National Minorities Act, prohibiting the dissemination of racial and ethnic hate propaganda and the creation of organizations and political parties that are based on racial hatred or discrimination. The Committee also noted that a certain Government had acted systematically to suppress speech and publications likely to incite racial hatred.[15]

31. In many instances, national institutions and ombudsmen have played an important role in the protection of victims of human rights violations. In one case, the national institution cooperated with the Government in the preparation of equality legislation, undertook national surveys on discrimination and integration in schools and racism in the media. The institution had also been involved in a public awareness campaign on immigration and refugee policy, and was planning to undertake education and training in human rights.[16]

B. Proposals approved by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

32. The Durban World Conference addressed several aspects of the incompatibility of racism, racial democracy, xenophobia and related intolerance with democracy. Its recommendations are summarized below under the following headings: law and policy; public institutions; civil society; media and education.

33. Law and policy. The Conference stated that the obstacles to overcoming racial discrimination and achieving racial equality lie mainly in the lack of political will, weak legislation and lack of implementation strategies and concrete action by States, as well as the prevalence of racist attitudes and negative stereotyping. The Conference urged universal ratification of ICERD by 2005 and the withdrawal of all reservations. It also recommended several national-level legislative, judicial, regulatory, administrative and other measures to prevent and protect against racism, racial discrimination, xenophobia and related intolerance. These include adopting (a) constitutional, legislative and administrative measures to foster equality, including reviewing, amending and repealing national legislation and administrative provisions that may give rise to discrimination; (b) national policies, action plans, legislation and administrative measures to combat racism, racial discrimination, xenophobia and related intolerance; (c) legislative and administrative policies and other preventive measures to protect certain groups of workers; (d) effective policies and programmes to prevent and ensure accountability for misconduct by police and other law enforcement personnel including prosecuting perpetrators of such misconduct; and (e) measures to end racial profiling.

34. The Conference also recommended policies and action plans, including affirmative action, to ensure non-discrimination, in particular as regards access to social services, employment, housing, education and health care. It called for better protection of the rights of workers who are subject to racism, racial discrimination, xenophobia and related intolerance through enhanced enforcement of legislation, public education and communications in the workplace, and urged States to eliminate disparities in health status, including by improving the health status of marginalized communities. The Conference recognized the importance of equal participation without discrimination in political, economic, social and cultural decision-making.

35. Public institutions which enable disagreements to be resolved through dialogue are also crucial in ensuring the protection of the rights of vulnerable groups. The Conference recommended the establishment or reinforcement where they already exist, of independent national institutions to combat racism, racial discrimination, xenophobia and related intolerance, and to provide assistance to victims.

36. Civil society. The Conference also recognized the fundamental role of civil society in the fight against racism, racial discrimination, xenophobia and related intolerance and in promoting the public interest. It recognized the contribution of non-governmental organizations to promoting human rights education and raising awareness about these phenomena. It also noted that promoting greater respect and trust among different groups within society must be a shared but differentiated responsibility of government institutions, political leaders, grass-roots organizations and citizens.

37. Media. Whether audio-visual, electronic or print, the media play an important role in democratic societies. While recognizing the media's positive contribution to the fight against racism, racial discrimination, xenophobia and related intolerance, the World Conference noted with regret that certain media, by promoting false images and negative stereotypes of vulnerable groups and individuals, particularly of migrants and refugees, have contributed to the spread of xenophobic and racist sentiments among the public and in some cases have encouraged violence by racist individuals and groups. Of particular concern to the World Conference was the use of the Internet for propagating racism, racial hatred, xenophobia, racial discrimination and related intolerance. The Conference also noted that children and youth having access to hate sites could be negatively influenced. It urged States, inter alia, to consider the following measures while taking steps to ensure freedom of opinion and expression: (a) to encourage Internet service providers to develop voluntary ethical codes of conduct and self-regulatory measures to protect against the dissemination of racist, xenophobic and other intolerance ideas; (b) to enact and implement appropriate legislation to prosecute those who use information and communications technologies to incite racial hatred or violence; (c) to use and strengthen international cooperation to respond to the rapidly evolving phenomenon of dissemination of hate speech and racist material through these media; and (d) to examine ways that the positive contribution made by these technologies can be enhanced through replication of good practices in combating racism, racial discrimination, xenophobia and related intolerance.

38. Education. The importance of education in creating awareness and promoting respect and tolerance to prevent and combat racism, racial discrimination, xenophobia and related intolerance cannot be overstated. It is worth recalling that article 13 of the International Covenant on Economic, Social and Cultural Rights states that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen respect for human rights and fundamental freedoms. It shall enable all persons to participate effectively in a free society, and promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups. Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination commits States parties to "adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups ...". The Durban World Conference re-emphasized not only the importance of access to education without discrimination, but also the role of human rights education in countering racism, racial discrimination, xenophobia and related intolerance and promoting better understanding amongst all cultures and civilizations.

V. CONCLUSIONS

39. Today, discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status persists in almost every country in the world. The Durban World Conference represented a renewed commitment to fight against the scourges of racism, racial discrimination, xenophobia and related intolerance. Its Declaration and Programme of Action offer a solid roadmap for future actions in the fight against racism, racial discrimination, xenophobia and related intolerance. These documents, coupled with the will to struggle for justice and equality, can greatly contribute to effective implementation of all human rights for all and to the building of inclusive democracies.

40. Democracy and the fight against racism are inseparable. Needless to say, any limitation of democratic freedoms is a very delicate issue and should be undertaken in full accordance with international law, including the human rights standards. We must however always be aware of the threat of arbitrariness. Those exposed to the threat of racism, and those who could be excluded or discriminated against on the basis of their origin must be effectively protected. Moreover, respect for human rights requires that appropriate preventive measures against racism, racial discrimination, xenophobia and related intolerance be taken. Express safeguards to protect vulnerable groups, including women, minorities, indigenous peoples, migrant workers or other domestically marginalized groups are essential. Democracy is based on the will of the majority, yet it seeks not to sacrifice the minority. It favours equality while recognizing that difference and diversity should be welcomed and protected. It seeks to protect the rights of the individual without neglecting the general welfare. Democratic States must guarantee the conditions for people of all cultures, ethnicities and religions to pursue their distinctive ways of life. Equally important, continuous efforts need to be made to remove obstacles which hinder groups or sectors of the population from exercising their voice or participating on an equal basis with others in conducting community affairs. Democracy is incompatible with racism, xenophobia and related intolerance: accepting its core values - freedom, tolerance and participation - one must reject these evils.

Notes

[1] Vienna Declaration and Programme of Action (A/CONF.157/23), Part I, para. 8.

[2] See Commission resolutions 2000/47 and 2001/36.

[3] The preamble to the International Convention on the Elimination of All Forms of Racial Discrimination states: "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and there is no justification for racial discrimination, in theory or in practice, anywhere". Its article 1 defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

[4] See Human Rights Committee, general comment No. 25, in HRI/GEN/1/Rev.5.

[5] See articles 18, 19, 21 and 22 of the ICCPR.

[6] In the case of freedom of speech and the right to information (article 19 of the ICCPR), restrictions which are necessary for respect of the rights or reputations of others, for the protection of national security or of public order (ordre public), or of public health or morals are admissible. Similarly, the right of peaceful assembly (article 21 of the ICCPR) and the right to freedom of association (article 22 of the ICCPR) may be restricted only for the purpose of respecting the rights and freedoms of others, and of ensuring morality, public order and the general welfare in a democratic society. The right to take part in the conduct of public affairs (article 25 of the ICCPR) cannot be subjected to unreasonable restrictions. All these provisions reflect an attempt to strike a balance between legitimate interests of the society or other individuals and the individual's rights and freedoms. Human rights law requires that only necessary and proportionate restrictions can be imposed on the human rights laid down in the ICCPR. The scope of these limitations should not be interpreted in such a way as to jeopardize the essence of the right concerned. On the contrary, they should be interpreted strictly in favour of the rights at issue. Any limitations should also be compatible with the objects and purposes of the Covenant and must not be arbitrarily applied. The burden of justifying a limitation under any Covenant right lies with the State (cf. general comment No. 29 adopted by the Human Rights Committee, in HRI/GEN/1/Rev.5).

[7] General recommendation No. XV, para. 4, in HRI/GEN/1/Rev.5.

[8] Ibid., para. 6.

[9] A/CONF.189/12, chap. I, Declaration, para. 86.

[10] See E/CN.4/1997/71, E/CN.4/1998/79, E/CN.4/2000/16 and Add.1, E/CN.4/2002/21.

[11] The reports of the seminars can be found on the World Conference against Racism page of the OHCHR web site.

[12] A/CONF.189/PC.2/21.

[13] Extreme-right organizations include ultranationalists, neo-Nazis, neo-fascists and skinheads.

[14] See also paragraphs 57-61 of the report.

[15] See reports of the Convention on the Elimination of All Forms of Racial Discrimination to the fifty-fifth and fifty-sixth sessions of the General Assembly (A/55/18 and A/56/18)

[16] See A/CONF.189/PC.1/8.

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CIVIL AND POLITICAL RIGHTS

The incompatibility between democracy and racism

Report of the High Commissioner for Human Rights

Addendum

1. The Commission on Human Rights, in its resolution 2001/43, invited the High Commissioner for Human Rights to submit an analytical report on the subject of "The incompatibility between democracy and racism". The report (E/CN.4/2002/69) has been submitted to the Commission at its present session. In addition to the replies reflected in Part III of the report, a reply has also been received from the Government of South Africa. The reply is summarized below.

2. South Africa has instituted constitutional measures, legislation, policies and practices to combat racism and racial discrimination. The Constitution of the Republic of South Africa (Act 108 of 1996) has eliminated the core notion of the racist base which underpinned apartheid, and instead enshrines the rights of all South Africans and affirms the democratic values of human dignity, equality and freedom. The Equality Act 2000 provides that neither the State nor any person may unfairly discriminate against any person. It outlaws any form of racism, including racial incitement, dissemination of ideas suggesting inferiority or superiority of any group of people, racially exclusive practices, or the use of hurtful and abusive language. The Government has implemented a number of policies to address the inequities of the past and has established monitoring bodies which work, inter alia, to combat racism and racial discrimination.

3. South Africa no longer has political parties with clearly racist platforms. All major parties have at least some supporters from every racial group and most attempt to broaden their support to encompass all such groups. Some very small non-violent groups still advocate self-determination for the Afrikaner group. The Government maintains a dialogue with representatives of this viewpoint and has declared its willingness to accommodate their projects so long as these do not clash with the fundamental non-racial principles of the new South African system.

4. The Government of South Africa remains concerned about racism, racially motivated violence, or unfair discrimination, both in South Africa and elsewhere in the world. Bearing this in mind, it agreed to host the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and worked to ensure a successful outcome. The Government speaks out strongly whenever necessary against continuing occurrences of racism.

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CIVIL AND POLITICAL RIGHTS

Right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms

Note by the Secretariat

1. At its fifty-seventh session, the Commission on Human Rights, recalling the requests contained in paragraphs 1 and 2 of its resolution 2000/41 and taking into account the note by the secretariat (E/CN.4/2001/61) in that regard, adopted decision 2001/105 in which it requested the Office of the High Commissioner for Human Rights to hold a consultative meeting in Geneva for all interested Governments, international organizations and non-governmental organizations in consultative status with the Economic and Social Council, with a view to finalizing the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" annexed to the final report of the independent expert (E/CN.4/2000/62), on the basis of the comments submitted. The Office of the High Commissioner was furthermore requested to transmit to the Commission at its fifty-eighth session the final outcome of the consultative meeting for its consideration.

2. The Office of the High Commissioner remains deeply committed to the process of finalizing the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law", and hereby informs the Commission that preparations are under way to hold the consultative meeting, as requested by the Commission in decision 2001/105, later in the year 2002.

3. The Office of the High Commissioner also takes this opportunity to welcome any further replies from States on this issue in response to the note verbale requesting comments on the "Basic principles and guidelines".

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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: DISAPPEARANCES AND SUMMARY EXECUTIONS

Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46

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Executive summary

The Commission, in resolution 2001/46, paragraph 11, requested the Independent Expert to "examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance" and to identify gaps "in order to ensure full protection from enforced or involuntary disappearance". As indicators for "full protection", the Expert took into account the relevant standards of protection developed by the Working Group on Enforced or Involuntary Disappearances and other expert bodies of the Commission, by the case law of the relevant international and regional treaty monitoring bodies and human rights courts, by the United Nations Convention against Torture, the United Nations Declaration on Disappearance, the Inter-American Convention on Disappearance, the draft convention on disappearance and in the relevant legal literature.

It emerges from this study that enforced disappearance is one of the most serious human rights violations, which, if committed as part of a widespread or systematic attack against civilians, constitutes a crime against humanity. As the annual reports of the Working Group on Enforced or Involuntary Disappearances to the Commission show, enforced disappearance today can be considered a universal phenomenon which continues in a considerable number of countries in a systematic manner. The crime of enforced disappearance is not only directed against the disappeared persons but equally against their families, friends and the society they live in. Often, the disappeared persons are killed immediately, but their children, parents or spouses continue to live for many years in a situation of extreme insecurity, anguish and stress, torn between hope and despair. They must, therefore, also be considered as victims of enforced disappearance.

In view of the extreme seriousness of this human rights violation, various measures have been taken in response by the international community at the universal and regional levels, and certain standards have been developed in the framework of international human rights, humanitarian and criminal law. At the same time, it must be recognized that protection against enforced disappearance is a slowly developing concept with many gaps, disputed questions and uncertainties.

Until today, no specific human right not to be subjected to enforced disappearance has been recognized, although this human rights violation has occurred systematically for almost 30 years. It is generally considered as a multiple human rights violation but there is no agreement on which human rights, apart from the right to personal liberty, are actually violated by an act of enforced disappearance. The various attempts at defining enforced disappearance in international human rights and criminal law have had differing outcomes. Although there seems to be general agreement that enforced disappearance needs to be combated by domestic criminal law measures (including the principle of universal jurisdiction) and by a broad range of preventive measures, no legally binding universal obligations exist in this respect. Since the protection of international criminal law will only apply in exceptional cases, universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future. Finally, there exist many gaps in respect of concrete measures of

prevention (such as the obligation to maintain centralized registers of all places of detention and all detainees) and in respect of the right of disappeared persons and their families to an effective remedy and to reparation.

Thus, the gaps in the current international legal framework outlined in the present report clearly indicate the need for a "legally binding normative instrument for the protection of all persons from enforced disappearance" as referred to in paragraph 12 of Commission resolution 2001/46. Such a legally binding normative instrument might be drafted as a separate human rights treaty, such as the draft international convention on the protection of all persons from forced disappearance, as an optional protocol to the Convention against Torture, or as an optional protocol to the International Covenant on Civil and Political Rights. Under the assumption that Governments wish to avoid a further proliferation of treaty monitoring bodies, the Human Rights Committee might be in the best position to undertake the additional task of monitoring States' compliance with their obligation to protect persons from enforced disappearance.

I. MANDATE AND METHODS OF WORK

1. In its resolution 2001/46, of 23 April 2001, the Commission on Human Rights requested its Chairperson, after consultations with the Bureau and the regional groups, to appoint an independent expert to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, taking into account relevant legal instruments at the international and regional levels, intergovernmental arrangements on judicial cooperation, the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission in its resolution 1998/25, and also comments of States and intergovernmental and non-governmental organizations, with a view to identifying any gaps in order to ensure full protection from enforced or involuntary disappearance and to report to the Commission at its fifty-eighth session and to the working group established under paragraph 12 of the same resolution at its first session. On 22 June 2001, the Chairperson of the Commission appointed Mr. Manfred Nowak as independent expert to carry out this mandate.

2. The expert considers this mandate to be of an exclusively legal nature. It consists of the following steps:

- Analysing the present international legal framework concerning disappearances;
- Identifying gaps in this legal framework; and
- Reporting to the Commission and its future intersessional working group.

3. In order to provide a comprehensive overview of the existing legal framework, the expert decided to include, in addition to the references listed in the Commission resolution, a short analysis of international humanitarian law. He also took into account relevant case law of regional and international human rights courts and treaty monitoring bodies, as well as legal literature concerning disappearances. Since the Commission explicitly requested the expert to take into account also the draft convention on disappearances, as well as the comments of States and intergovernmental and non-governmental organizations (NGOs), the expert decided to include in his report also a few preliminary comments on the draft convention; he will, however, refrain from analysing the draft and commenting upon it in detail since this would, in his opinion, interfere with the work of the future intersessional working group. A short description of the phenomenon of enforced disappearances introduces the topic and provides some empirical background for a better understanding of the need for an appropriate legal response by the international community.

4. The main task of the expert is to identify "gaps in order to ensure full protection from enforced or involuntary disappearance". In order to identify these gaps, the expert has to compare the existing legal framework with a possible future legal framework aimed at ensuring full protection. He interprets the term "full protection" as the best possible system of protection and draws on existing examples, such as the protection against torture at the universal and regional levels. In this regard, he also takes into account the draft convention on disappearances.

5. The legal analysis follows the established methods of legal interpretation and research. Since this mandate does not seem to include any operational aspects, the expert refrained from undertaking any missions or carrying out any empirical human rights fact-finding.

II. THE PHENOMENON OF ENFORCED DISAPPEARANCE

6. Human beings fail to return home and are then reported as missing by their families and friends for various reasons: armed conflicts, natural disasters, internal disturbances, riots or criminal abduction. They may even be absconding voluntarily in order to escape justice or for any other reason. In the case of armed conflict, internal disturbances, natural disasters and certain other situations of humanitarian need (such as searching for natural parents, or restoring family links for detained illegal immigrants - not for reasons of family dispute or personal controversy) the International Red Cross and Red Crescent Movement may take action to trace missing persons.[1] The International Committee of the Red Cross (ICRC), with the assistance of its Central Tracing Agency, has long experience in searching for soldiers and combatants who go missing during military operations ("missing in action") and for civilians who are reported missing as a consequence of armed conflict. The national Red Cross and Red Crescent societies also accept and process tracing requests in cases of natural disaster and humanitarian need.

7. The human rights violation and crime of enforced or involuntary disappearance is a much more narrow concept and a fairly recent phenomenon. It seems to have been invented by Adolf Hitler in his Nacht und Nebel Erlass (Night and Fog Decree) of 7 December 1941.[2] The purpose of this decree was to seize persons in occupied territories "endangering German security" who were not immediately executed and to transport them secretly to Germany, where they disappeared without trace. In order to achieve the desired intimidating effect, it was prohibited to provide any information as to their whereabouts or fate.

8. The phenomenon reappeared as a systematic policy of State repression during the late 1960s and early 1970s in Latin America, starting in Guatemala and Brazil. The term "enforced disappearance" was first used by Latin American NGOs and is a translation of the Spanish expression "desaparicion forzada". The Inter-American Commission on Human Rights and the United Nations Commission on Human Rights were the first international human rights bodies to respond to this phenomenon during the 1970s, both in general terms and with regard to specific cases which had occurred in Chile since the military coup d'état of 11 September 1973.[3] The first illustration of such a case in a United Nations document can be found in the report of the Ad Hoc Working Group on the human rights situation in Chile submitted to the Commission on 4 February 1976.[4]

9. "Alphonse-René Chanfreau, son of a French father and a Chilean mother, was arrested in July 1974 at his home in Santiago. His wife Erika and her baby were taken by a DINA[5] inspector to the home of her parents. The following morning she was taken away by security forces to an ordinary-looking house near a church. She joined about 60 other people, among them her husband, being held in a single room. All were blindfolded, and they were watched by two armed guards. Mrs. Chanfreau was not interrogated herself and some time later she was allowed to say goodbye to her husband. Three days after she was transferred to the women's section of the Tres Alamos prison where some 100 women were being held. On 7 November, following the intervention of the Government of France, she was able to leave Chile, but was

unable to obtain any official news about her husband. According to the international press, all public and private inquiries received one and the same answer: we know nothing of Mr. Chanfreau; he has never been in our custody; his name cannot be found in any of our prison records".[6]

10. Since then, the practice of enforced disappearance has unfortunately become a truly universal phenomenon. Over the past 20 years, the Commission's thematic Working Group on Enforced or Involuntary Disappearances has transmitted some 50,000 individual cases of disappearances to the Governments of almost 90 countries in all regions of the world.[7] Only about 10 per cent of these cases could be clarified through the efforts of the Working Group. The countries with the highest number of outstanding cases currently are Iraq and Sri Lanka, followed by Argentina, Guatemala, Peru, El Salvador, Algeria, Colombia, Chile, Indonesia, Iran, the Philippines, Lebanon, India, the Sudan, Mexico, the Russian Federation, Yemen, Honduras, Morocco, Ethiopia, Nicaragua and Turkey. In 2001, the largest number of cases reported to the Working Group occurred in Nepal, Colombia and Cameroon, while in 2000 and 1999, Indonesia, India, the Russian Federation and Colombia had the largest number of reported cases.[8] In previous years, the Working Group had transmitted the most cases to the Government of Algeria. Although the figures published by the Working Group only refer to cases that are registered on its files and may, therefore, not be representative of the overall phenomenon of enforced disappearance, they show that disappearances are a violation of human rights which occurs universally and which would require a much stronger response from the international community.

III. THE RESPONSE OF THE INTERNATIONAL COMMUNITY TO ENFORCED DISAPPEARANCES

11. The Inter-American Commission on Human Rights began denouncing the phenomenon of disappearances in 1974, both in general terms and in reference to specific cases in Chile, in its regular reports to the General Assembly of the Organization of American States (OAS).[9] Despite repeated calls from the Inter-American Commission, the OAS General Assembly failed to take action until a 1979 resolution on Chile, in which it declared that the "practice of disappearances is an affront to the conscience of the Hemisphere".[10] The Inter-American Commission's visit to Argentina in September 1979 confirmed the systematic practice of enforced disappearance [11] by the successive military juntas and marked a turning point in intergovernmental organization fact-finding on disappearances. But the response by the OAS General Assembly was limited. While calling on affected Governments to put an immediate end "to any practice that leads to the disappearance of persons",[12] the OAS General Assembly failed to single out Argentina, which was considered by some authors[13] as a response to Argentina's threat to withdraw from the OAS. But, responding to repeated calls from NGOs and organizations of victims' families, the OAS General Assembly, in 1979, exhorted those States in which persons had disappeared to abstain from enacting or applying laws that might make difficult the investigation of such disappearances,[14] and in 1983, characterized forced disappearance as a "crime against humanity".[15]

12. The United Nations Commission on Human Rights for the first time called for specific efforts to trace "persons unaccounted for" on 13 February 1975 in relation to Cyprus.[16] The United Nations General Assembly in 1975 stressed the humanitarian need for families in Cyprus

to be informed about the fate of their members who were unaccounted for as a result of armed conflict,[17] and on 16 December 1977 it decided to establish, with the participation of the ICRC, a commission to investigate the fate of missing persons in Cyprus.[18] Since the situation of these missing persons resulted from a situation of armed conflict, they are not considered as "disappeared persons" in the narrow legal meaning of this term, and both the Commission and the General Assembly referred to them usually as "missing persons" or "persons unaccounted for".

13. The same term was originally also used in relation to Chile when the General Assembly, on 9 December 1975, called upon the Chilean authorities to take steps to clarify the status of individuals who were not accounted for.[19] But the General Assembly soon adapted the terminology it used to that used by the Ad Hoc Working Group on the situation of human rights in Chile[20] and in 1977 the General Assembly expressed "its particular concern and indignation at the continuing disappearance of persons, which is shown by the available evidence to be attributable to political reasons, and the refusal of the Chilean authorities to accept responsibility or to account for the large number of such persons, or even to undertake an adequate investigation of cases drawn to their attention".[21] In 1978, the General Assembly, "deeply concerned by reports from various parts of the world relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations", adopted a resolution dealing specifically with "disappeared persons" and requested the Commission to make appropriate recommendations.[22] In response to this request, the Commission authorized its Chairman on 6 March 1979 "to appoint as experts in their individual capacity, Mr. Felix Ermacora and Mr. Waleed M. Sadi to study the question of the fate of missing and disappeared persons in Chile".[23] After Mr. Sadi resigned under political pressure in August 1979, Mr. Ermacora decided to continue to carry out this mandate alone and submitted a comprehensive report to the General Assembly on 21 November 1979.[24]

14. In his report, Mr. Ermacora arrived at the conclusion that the systematic practice of enforced disappearances constituted a situation of gross violations of human rights and that "the Chilean Government is responsible under international law for the fate of at least 600 cases of missing persons whose basic rights as human being have been infringed and violated ... The Chilean Government owes it to the international community to explain and clarify the fate of these missing persons, to punish those responsible for the disappearances, to compensate the relatives of the victims and to take measures to prevent such acts from recurring in the future."[25] He also considered that the "disappearance of these persons constitutes a continuous situation of violations of human rights and an acute humanitarian problem to their relatives, who wish, and have a right, to know what happened to their family members".[26] In his recommendations, Mr. Ermacora also proposed a number of preventive measures, such as the prohibition of secret places of detention, the maintenance of a central register of arrest and detention, the right of civilian judges to visit all places of detention, a strict requirement of written arrest orders and other measures to strengthen the rule of law and the minimum standards in case of deprivation of liberty.[27] Finally, he stressed that disappearances occurred also in other countries and that his study might be useful for "the development of national and international measures designed to prevent the disappearance of persons and to mobilize the necessary means to search for missing persons in the various regions of the world".[28]

15. The study by Felix Ermacora on the question of disappeared persons in Chile has been cited at some length since it contains a number of highly relevant conclusions and recommendations which were later taken up by international organizations and bodies and which will be used in the present study for the purpose of identifying gaps in the existing legal framework. Only a few months after Mr. Ermacora submitted his report, the Commission, on the basis of a French initiative, took up one of his proposals and decided on 29 February 1980 "to establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons".[29] This Working Group on Enforced or Involuntary Disappearances became the first so-called thematic mechanism of the Commission and the most important United Nations body dealing with disappearances. From the very beginning, the Working Group decided "to approach its tasks in a humanitarian spirit and to seek the cooperation of all concerned in finding a solution to the problem of enforced or involuntary disappearances and of determining the whereabouts or fate of persons reported missing or disappeared".[30] In its methods of work,[31] the Working Group specified as its major aim "to establish a channel of communication between the families and the Governments concerned, with a view to ensuring that sufficiently documented and clearly identified individual cases which families, directly or indirectly, have brought to the Group's attention, are investigated with a view to clarifying the whereabouts of the disappeared persons". It only deals with disappearances for which Governments can be held accountable and it does not accept cases arising from armed conflict. Up to 2001, it registered and transmitted a total of 49,802 cases to Governments of 88 countries, of which 7,920 cases could be clarified. In addition, the Working Group made a considerable number of recommendations to the Commission and Governments as to how to improve the protection of disappeared persons and their families and to prevent the occurrence of enforced disappearances. These recommendations were partly taken up in the drafting of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, and will be considered below in the context of identifying gaps in the legal framework.

16. The international community also responded to the continuing phenomenon of enforced disappearances by undertaking relevant standard-setting activities in the fields of human rights law, humanitarian law and criminal law, as well as by the development of case law by the treaty monitoring bodies and human rights courts. These activities and standards will be analysed in more detail in the following chapters.

IV. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

A. Case law

1. United Nations Human Rights Committee

17. The Human Rights Committee was established in 1977 in accordance with article 28 of the International Covenant on Civil and Political Rights[32] with the task of monitoring the compliance of States parties with their obligations under the Covenant by examining State reports, inter-State communications and individual communications submitted in accordance with the first Optional Protocol to the Covenant.[33] The Covenant does not contain a specific right to be protected against enforced disappearance but other relevant rights, such as the right to an effective domestic remedy (art. 2 (3)), the right to life (art. 6), the prohibition of torture, cruel,

inhuman or degrading treatment or punishment (art. 7), the right to liberty and security of person (art. 9), the right of detainees to be treated with humanity and respect for the dignity (art. 10), the right to recognition as a person before the law (art. 16) and the right of children to special measures of protection (art. 24).

18. In the context of examining State reports under article 40 of the Covenant, the Committee adopted in July 1982 a general comment on the right to life,[34] in which it stated inter alia:

> "States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."

19. As early as 1978, the Committee received the first communication under the Optional Protocol relating to a disappearance case. It was submitted by the daughter and wife of the victim, Eduardo Bleier, who were living abroad at that time, in Israel and Hungary respectively. The applicants alleged that Mr. Bleier, a former member of the banned Communist Party, had been arrested by the Uruguayan authorities without a court order in October 1975 and was being held incommunicado at an unknown place of detention. Although the authorities did not acknowledge his arrest, his detention was indirectly confirmed because his name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing. A number of former detainees who had been held together with Mr. Bleier gave independent but similar accounts of the particularly cruel torture to which he had been subjected. The Committee found breaches of articles 7, 9 and 10.1 of the Covenant and "serious reasons to believe that the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities". As a remedy, it urged the Government of Uruguay "to take effective steps (i) to establish what has happened to Eduardo Bleier since October 1975; to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment; and to pay compensation to him or his family for any injury which he has suffered; and (ii) to ensure that similar violations do not occur in the future".[35]

20. In 1983, the Committee adopted a second decision against Uruguay in a disappearance case, which was submitted by the mother of the victim, on behalf of her daughter, Ms. Elena Quinteros Almeida, and herself. The applicant stated that her daughter had been arrested at her home on 24 June 1976. Four days later, while she was being held completely incommunicado, she was taken by military personnel to a place in the city of Montevideo near the Embassy of Venezuela. Ms. Quinteros succeeded in jumping over a wall and landed inside the Embassy grounds. The military personnel, however, after striking the Secretary of the Embassy and other staff members, dragged her, off the premises of the Embassy. Since that date, her mother had never been able to obtain from the authorities any official information about her daughter's whereabouts and her detention had never been officially admitted. Venezuela suspended its diplomatic relations with Uruguay. The Committee again found violations of articles 7, 9 and 10.1 of the Covenant, in relation to Ms. Quinteros. In addition, the Committee stated that it understood "the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the

violations of the Covenant suffered by her daughter, in particular article 7".[36] The remedies recommended were similar to those in the Bleier case and also included the obligation of the authorities of Uruguay to secure the release of the victim.

21. This case law was further developed by the Committee in a number of other cases.[37] In the case of the Sanjuan brothers, who had disappeared in March 1982, presumably after their arrest by agents of the "F2", a section of the Colombian police force, the Committee explicitly referred to its general comment 6/16 and concluded that the rights to life, liberty and security of the person had not been effectively protected by the State of Colombia.[38] In the case of Rafael Mojica, the son of a well-known labour leader in the Dominican Republic, who had received death threats from military officers before he disappeared in Santo Domingo in May 1990, the Committee again referred to general comment 6/16 and found violations of articles 6, 7 and 9 of the Covenant. With respect to article 7, the Committee added the following statement which is in line with its general jurisprudence on incommunicado detention: "Aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident in concluding that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7."[39] The remedies recommended were similar to those in earlier cases, but from then on the Committee explicitly referred to article 2.3 of the Covenant.

22. The question of an effective remedy was further developed in the cases of Bautista and Laureano. Nydia Bautista, a member of the 19 April Movement ("M-19") in Colombia, was abducted from her family home in Bogotá in August 1987. According to eyewitnesses, she was pulled into a Suzuki jeep by eight men, who were armed but dressed as civilians. An eyewitness identified the jeep's licence plate. Ms. Bautista's abduction was immediately brought to the attention of the authorities, and as a result of pressure by the family, as well as of the relevant judicial investigations, her body was exhumed and identified, and the persons responsible for the disappearance were found. In 1995, an administrative tribunal granted the claim for compensation filed by her family, and disciplinary sanctions were pronounced against two military intelligence officers. In accordance with its general comment 6/16 and earlier jurisprudence, the Committee found violations of articles 6, 7 and 9 of the Covenant. With respect to the right to an effective remedy, it added, however, that in the event of particularly serious human rights violations "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies" within the meaning of article 2.3 of the Covenant.[40]

23. The case of Ana Rosario Celis Laureano[41] concerns a Peruvian girl, born in 1975, who was abducted from her house by kidnappers wearing military uniforms on 13 August 1992, and was kept incommunicado. Her grandfather, who submitted the communication, never succeeded in obtaining any information on her fate and whereabouts. The Committee regretted the absence of cooperation on the part of the Peruvian authorities and, recalling its general comment on article 6, found that Ana Laureano's right to life, enshrined in that article, had not been effectively protected by the State party. The Committee also concluded that there had been violations of articles 7 and 9 of the Covenant. Furthermore, regarding the victim's status as a minor, the Committee concluded that Ms. Laureano had not benefited from the special measures of protection she was entitled to on account of her status, and that there had been a violation of the right of every child under article 24.1 of the Covenant to special measures of protection,

including the recognition of the child's legal personality. With respect to the State obligation to provide victims with an effective remedy (under article 2.3), the Committee urged the State party to open a proper investigation into the disappearance of Ms. Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.

24. In the well-known case of the disappearance of an Argentinian child, the Committee had already previously found a violation of the right of every child under article 24.1 of the Covenant to special measures of protection, including the recognition of the child's legal personality. In February 1977, the then nine-month-old Ximena Vicario had been taken, together with her parents, to the headquarters of the Federal Police in Buenos Aires and had subsequently disappeared. Whereas the fate and whereabouts of her parents were never established, she had been adopted by a nurse and was located by her grandmother in 1984. Because of various legal disputes and extremely slow court proceedings, the grandmother was only granted "provisional" guardianship of the child in 1989. In 1993, the legal identity of the child was officially recognized, and, in 1994 (when she had reached the age of 18), the nullity of the adoption by the nurse was finally confirmed. As a remedy, the Committee explicitly encouraged the Government of Argentina "to persevere in its efforts to investigate the disappearance of children, determine their true identity, issue to them identity papers and passports under their real names, and grant appropriate redress to them and their families in an expeditious manner".[42]

25. In the context of the State reporting procedure under article 40 of the Covenant also, the Committee has sometimes addressed the issue of enforced disappearances, particularly in its concluding observations. In relation to Algeria, for example, the Committee stressed its grave concern in 1998 "at the number of disappearances and at the failure of the State to respond adequately, or indeed at all, to such serious violations. Disappearances may involve the right to life consecrated under article 6 of the Covenant, and where the disappeared individuals are still alive and are kept incommunicado, disappearances may involve the right guaranteed under article 16 of the Covenant which provides that every individual shall have the right to recognition everywhere as a person before the law. In this situation these individuals are also deprived of their capacity to exercise all the other rights, without any recourse, recognized under the Covenant. Furthermore, disappearances violate article 7 with regard to the relatives of the disappeared."[43] As a remedy, the Committee urged the Government of Algeria inter alia to establish a central register to record all reported cases of disappearances and day-to-day action taken to trace the disappeared.

2. Inter-American Court of Human Rights

26. The Inter-American Court of Human Rights was established in 1979 in accordance with article 52 of the American Convention on Human Rights of 1969.[44] It has the power, if explicitly recognized by a State party, to issue final and binding judgements in inter-State and individual cases.[45] Like the Covenant, the American Convention does not explicitly provide a right not to disappear. But the following provisions of the Convention have proved to be relevant in disappearance cases: the general obligation to respect and ensure the rights in the Convention (art. 1), the right to juridical personality (art. 3), the right to life (art. 4), the right to

humane treatment (art. 5), the right to personal liberty and security (art. 7), the right to a fair trial (art. 8), the rights of the child (art. 19), the right to judicial protection (art. 25) and the power of the court to order remedies, including compensation, as well as provisional measures (art. 63).

27. The leading case of disappearance considered by the Inter-American Court is that of Velasquez Rodriguez against Honduras, the well-known 1988 judgement which contains a far-reaching pronouncement of the principle of State responsibility for enforced disappearance in the absence of full direct evidence.[46] Manfredo Velásquez Rodrigues, a Honduran student, had been kidnapped in September 1981 in the Honduran capital, Tegucigalpa, by heavily armed men in civilian clothes driving a vehicle without number plates. After a petition had been submitted on his behalf, the Inter-American Commission on Human Rights referred the case to the Court. In the Court's judgement, the kidnappers were connected to the Honduran Armed Forces or were under their direction. In order to establish State responsibility, the Court also relied on circumstantial and presumptive evidence, which it found especially important in cases of alleged disappearance, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the fate and whereabouts of the victim. The Court referred to a systematic practice of disappearances in Honduras in the early 1980s and to the obligation of States parties under article 1 (1) of the American Convention to ensure human rights. This implies the duty of States to organize the governmental apparatus so that they are capable of judicially ensuring the free and full enjoyment of human rights. As a consequence, States must prevent, investigate and punish any violation of the rights recognized in the Convention. Even if it had not been fully proven that Mr. Velásquez had been kidnapped and killed by State agents, the failure of the State apparatus to investigate his disappearance was a failure by Honduras to fulfil its duty under article 1 (1) of the Convention. The Court, therefore, found the Government responsible for the disappearance, established a violation of articles 4, 5 and 7 of the Convention, read in conjunction with article 1 (1), and ordered Honduras to pay fair compensation to the next of kin of the victim.

28. The Court affirmed and further developed this jurisprudence in a number of cases. In the Godinez Cruz against Honduras case it found the same violations as in the Velásquez Rodriguez case.[47] In Caballero-Delgado and Santana against Colombia, it found violations of articles 4 and 7 of the Convention, read in conjunction with article 1 (1), but not a violation of the right to humane treatment under article 5, since there was insufficient proof that those detained were tortured or subjected to inhumane treatment.[48] In the latter case the Court, in a separate judgement pursuant to article 63 of the Convention, decided that the State of Colombia must pay US dollars 89,500 to the relatives of the victims as compensation and was obliged to continue its efforts to locate and identify the remains of the victims and deliver them to their next of kin.[49]

29. The case of Blake against Guatemala was initiated by the family of Nicholas Blake, a United States journalist who was abducted by a Civil Self-Defence Patrol in March 1985 and killed shortly thereafter. His fate, however, remained unknown for seven years and was only discovered after intensive investigations by his family, with the assistance of the United States Embassy and United States forensic experts, in 1992. Since Guatemala recognized the contentious jurisdiction of the Court only in March 1987, i.e. two years after the abduction and assumed assassination of the victim, the Court declared itself incompetent ratione temporis in relation to the alleged violations of articles 4 and 7 of the Convention. It found, however, violations of articles 5 and 8 in relation to the relatives of Mr. Blake and ordered the State of

Guatemala, in addition to paying compensation, to investigate the acts denounced and punish the persons responsible for the disappearance and death of Mr. Blake. In arriving at this conclusion, the Court reaffirmed that "forced or involuntary disappearance is one of the most serious and cruel human rights violations" and "constitutes a multiple and continuing violation of a number of rights protected by the Convention". The Court ruled that the right to a fair trial contained in article 8 of the Convention "recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained". With respect to finding the family victim of a violation of article 5, the Court stressed that "the circumstances of such disappearance generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate".[50]

30. In the Guatemalan "Street children" case,[51] based on the allegations of abduction, torture and murder of five youths (three of whom were minors when they were killed) and of the failure of the respondent State to deal appropriately with the said violations and provide the victim's families with access to justice, the Court found violations of articles 1 (1), 4, 5 (1), 7 and 19 to the detriment of the victims, as well as of articles 5 (2), 8 and 25 to the detriment both of the victims and of their immediate next of kin. Regarding the right to judicial protection, the Court established that article 25 "assigns duties of protection to the States parties through their domestic legislation, from which it is clear that the State has the obligation to design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities". Furthermore, regarding the allegations of torture and considering that the Inter-American Convention to prevent and punish torture developed the principles contained in article 5 of the American Convention on Human Rights in greater detail and therefore constituted an auxiliary instrument to the Convention, the Court concluded that Guatemala had failed to comply with its obligations to prevent and punish torture in the terms of articles 1, 6 and 8 of the American Convention to prevent and punish torture, to the detriment of the victims.

31. This jurisprudence was reaffirmed and further developed by the Court in the recent case of Efrain Bamaca Velasquez against Guatemala.[52] Efrain Bamaca Velasquez, a combatant with the Guatemalan National Revolutionary Union (URNG) known as "Comandante Everardo", disappeared in March 1992, following a clash between the army and guerrilla forces in the village of Montufar, in the eastern part of Guatemala. According to the facts established by the Inter-American Commission on Human Rights, Efrain Bamaca Velasquez was captured by members of the Guatemalan Army, secretly detained in military premises and tortured. Thereafter he "disappeared". According to the circumstances of this case, involving the international responsibility of Guatemala as a State party to the Convention, the Court found breaches of articles 1 (1), 4 and 7 to the detriment of Bamaca Velasquez, as well as of articles 5 (1), 5 (2), 8 and 25 to the detriment of both Bamaca Velasquez and his relatives. Dealing however for the first time with the right to juridical personality under article 3 in a disappearance case, the Court recalled that the Inter-American Convention on Forced Disappearance of Persons "does not refer expressly to this right among the elements that typify the complex crime of forced disappearance of persons" and thus deemed that this right was not

violated. In connection with the violation of the "right to truth of the next of kin of the victim and of the society as a whole"[53] alleged by the Inter-American Commission, though recognizing that "it is undeniable that this situation has prevented [Bamaca Velasquez's wife] and the victim's next of kin from knowing the truth about what happened to him", the Court ruled that in the circumstances of the instant case, "the right to truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in articles 8 and 25 of the Convention". Furthermore, the Court concluded that Guatemala had failed to comply with its obligations to prevent and punish torture in the terms of articles 1, 2, 6 and 8 of the Inter-American Convention to prevent and punish torture, to the detriment of Efrain Bamaca Velasquez.

32. The case of Durand and Ugarte against Peru concerns the well-known uprising at three penal centres in Lima in June 1986.[54] According to official figures, in the military operations against the prisoners in the so-called Blue Pavillion, 111 persons died, 34 surrendered and 7 inmates, including Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, disappeared. The Court found violations of articles 1 (1), 2, 4, 7, 8 and 25 in relation to the disappeared persons, but denied a violation of the right to humane treatment under article 5, since it had not been proven that the victims had been subjected to mistreatment or that their dignity had been damaged by the Peruvian authorities while they were detained.[55] Regarding the implementation of article 63 (1), the Court emphasized "the right of the victim's relatives to know about their fate and the whereabouts of their mortal remains" and decided in particular that the State was compelled "to make every possible effort to locate and identify the victims' mortal remains and deliver them to their relatives, as well as to investigate the facts and process and sanction the liable parties".

33. The case of Trujillo Oroza against Bolivia[56] concerns the arrest, without a court order, of a Bolivian student in December 1971. Although his mother had managed to visit him daily in the El Pari prison, he had been subjected to physical torture and disappeared in February 1972. His mother filed various petitions with the Bolivian authorities, but it was only in January 1999 that an official judicial investigation was initiated. In September 1992, she filed a complaint with the Inter-American Commission, which submitted the case to the Court in June 1999. At the public hearing on 25 January 2000, Bolivia formally acknowledged its responsibility for the facts as alleged by the mother and presented by the Commission. The Government also offered apologies to the family, stated that it was modifying its domestic legislation so as to avoid the recurrence of such events and so that the disappearance of persons would be punished, and offered the family compensation of US$ 4,000. Thus, recognizing that "Bolivia's acquiescence is a positive contribution to this proceeding and to the exercise of the principles that inspire the American Convention on Human Rights", the Court considered that the dispute between the State and the Commission with regard to the events at the origin of the case had ceased, and declared, in accordance with the terms of the State's acknowledgement of responsibility, that Bolivia had violated the rights protected by articles 1 (1), 3, 4 and 7 of the American Convention on Human Rights to the detriment of José Carlos Trujillo Oroza and articles 5 (1) and (2), 8 (1) and 25 to the detriment of both the victim and his next of kin. The reparations proceedings are yet to be concluded.

3. European Court of Human Rights

34. The European Court of Human Rights was established in 1959 in accordance with article 38 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and in 1998 was turned into a single and permanent court pursuant to the 11th Additional Protocol to the Convention.[57] All member States of the Council of Europe are bound to ratify the European Convention, and the jurisdiction of the Court is compulsory for both inter-State and individual applications. Like the Covenant and the American Convention, the European Convention does not contain any explicit prohibition of enforced disappearance, and the Court was only fairly recently seized with disappearance cases in the context of the conflict between the Turkish security forces and members or supporters of the Kurdistan Workers Party (PKK) in the Kurdish region of south-eastern Turkey. The relevant provisions of the Convention are the general obligation of States to secure the rights and freedoms defined in the Convention (art. 1), the right to life (art. 2), the prohibition of torture, inhuman or degrading treatment or punishment (art. 3), the right to liberty and security of person (art. 5), the right to an effective remedy before a national authority (art. 13) and the power of the Court to afford just satisfaction to the injured party (art. 50, read with art. 41).

35. The leading case is that of Kurt against Turkey.[58] This application was submitted by the mother of Mr. Üzeyir Kurt on her own behalf and on behalf of her son, who had been surrounded in the Kurdish village of Agilli by members of Turkish security forces in November 1993 and taken into custody, where he subsequently disappeared. Since submitting her application to the European Commission of Human Rights in May 1994, the applicant and her lawyer had been the target of a concerted campaign by the Turkish authorities to make her withdraw her application. In its well-known judgement of May 1998, the Court found a violation of article 5 in respect of Mr. Üzeyir Kurt, but held that it was not necessary to decide on the alleged violation of articles 2 and 3 of the European Convention. It found, however, that his mother was a victim of article 3, considering that she had been left with the anguish of knowing that her son had been detained, with a complete absence of official information as to his subsequent fate over a prolonged period of time. In view of the lack of any meaningful investigation by the State, the Court also established a violation of article 13. In addition, the Court held that Turkey had not complied with its obligation under article 25 not to hinder in any way the effective exercise of the right of individual petition to the European Commission of Human Rights. As a remedy, Turkey was ordered to pay the applicant 10,000 pounds sterling, by way of compensation for non-pecuniary damage, and another 15,000 pounds sterling in respect of her son.

36. This jurisprudence has been affirmed and further developed in a number of cases. The case of Kaya against Turkey concerns a medical doctor, Dr. Hasan Kaya, who was known to have treated PKK members and who had received death threats before his disappearance. Together with his friend Metin Can, a lawyer and president of a local human rights association in south-eastern Turkey, he was asked by unidentified men to visit a wounded PKK member hidden outside town on 21 February 1993. The two men left and were not seen again. About one week later, their dead bodies were found more than 100 kilometres away. The case was submitted on 13 August 1993 by Dr. Kaya's brother to the European Commission of Human Rights, which referred it on 8 March 1999 to the Court. Although the Court concluded that there was insufficient evidence to support a finding beyond reasonable doubt that State officials had carried out the disappearance and killing of Dr. Kaya, it held that the Turkish authorities had "failed to

take reasonable measures available to them to prevent a real risk to the life of Hasan Kaya". In addition, the investigation carried out into the disappearance and killing "has not been conducted with the diligence and determination necessary for there to be any realistic prospect of the identification and apprehension of the perpetrators". Both failures of the Turkish authorities were considered as a violation of article 2 of the Convention. Since there was some forensic evidence that the victim had been ill-treated after his disappearance and prior to his death, the Court also found a violation of article 3 by the State in this case, for not having taken adequate measures to protect him against inhuman and degrading treatment. In order to justify the finding of violations on the basis of a failure to comply with positive obligations deriving from articles 2 and 3 of the Convention, the Court also relied on the obligation of States under article 1 to secure to everyone the rights and freedoms defined in the Convention. In addition, the Court established a violation of article 13 and ordered Turkey to pay the applicant 15,000 pounds sterling in respect of his brother, by way of compensation for non-pecuniary damage. Although no violation was found in respect of the applicant, he was also awarded 2,500 pounds sterling compensation for non-pecuniary damage, "which cannot be compensated solely by the findings of violations".[59]

37. The case of Tas against Turkey concerns a member of the PKK who was shot in the knee and taken into custody by Turkish security forces on 14 October 1993. He subsequently disappeared and the explanation of the Turkish authorities that he had escaped from the security forces on 9 November 1993 while assisting them in an operation in the mountains to find PKK shelters was not considered by the Commission and the Court as plausible. The application was submitted on 7 June 1994 by the victim's father to the Commission, which referred it to the Court on 23 October 1999. The Court found violations of article 2 of the Convention on the grounds that "Mushin Tas must be presumed dead following his detention by the security forces", which engages the responsibility of the State for his death, and that "the investigation carried out into the disappearance of the applicant's son was neither prompt, adequate or effective and therefore discloses a breach of the State's procedural obligation to protect the right to life". In the absence of evidence of torture or ill-treatment during his disappearance, the Court found no violation of article 3, nor did it consider it appropriate to make any finding under that provision concerning the effect the incommunicado detention might have had on Muhsin Tas. It found, however, a violation of article 3 in respect of the suffering of the father, but emphasized at the same time that the Kurt case did not, however, establish any general principle that a family member of a "disappeared person" was thereby a victim of treatment contrary to article 3. It also established a particularly grave violation of article 5 and a violation of article 13, and awarded the applicant in respect of his son, by way of compensation for non-pecuniary damage, 20,000 pounds sterling, and the applicant himself another 10,000 pounds sterling.[60] Similar findings were made in the case of Mrs. Hamsa Cicek who had submitted an application in respect of her two sons and her grandson, who had disappeared in May 1994 after having been detained by Turkish soldiers.[61]

38. The fourth inter-State case of Cyprus v. Turkey[62] relates to the situation that has existed in northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus. In connection with that situation, Cyprus maintained that Turkey was accountable under the European Convention for the violations of several human rights of Cypriots. In its application lodged with the European Commission of Human Rights on 22 November 1994, the Government of Cyprus invoked

allegations with reference to four broad categories of complaints, among them violations of the rights of Greek-Cypriot missing persons and their relatives. It essentially claimed that "about 1,491 Greek-Cypriots were still missing 20 years after the cessation of hostilities, these persons were last seen alive in Turkish custody and their fate has never been accounted for by the respondent State". The Commission proceeded on the understanding that its task was not to establish what actually happened to the Greek-Cypriots missing persons but rather to determine "whether or not the alleged failure of the respondent State to clarify the facts surrounding the disappearances constituted a continuing violation of the Convention". On this basis, in a Grand Chamber judgement delivered on 10 May 2001, the Court found: "there has been a continuing violation of article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances". However, in the absence of evidence that any of the missing persons were killed in circumstances engaging the respondent State's liability, the Court found no violation of article 2 in that respect. It also established a continuing violation of article 5. As to the relatives of the missing persons, the Court found a violation of article 3, considering that "the silence of the authorities of the respondent State in the face of the real concerns of the relatives attained a level of severity which could only be categorized as inhuman treatment".

4. Human Rights Chamber for Bosnia and Herzegovina

39. The Human Rights Chamber for Bosnia and Herzegovina is a human rights court established in accordance with Annex 6 of the Dayton Peace Agreement of 14 December 1995 with the mandate to decide in a final and binding manner on alleged or apparent violations of the European Convention on Human Rights and on alleged or apparent discrimination in the enjoyment of any right enlisted in 15 international and European human rights treaties.[63] The respondent parties are the State of Bosnia and Herzegovina and its two "Entities", i.e. the Federation of Bosnia and Herzegovina and the Republika Srpska. The power of the Chamber to order remedies in accordance with article XI of Annex 6 go beyond those of the European Court of Human Rights and include orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) and provisional measures.

40. During the war between 1992 and 1995, more than 20,000 persons were reported missing in Bosnia and Herzegovina, and many of these missing persons can be considered as cases of enforced disappearances in the narrow meaning of this term since the practice of disappearance was part of the strategy of "ethnic cleansing" operations. Since these disappearances occurred in the context of an armed conflict, which was partly of an international nature, and since many disappearances were carried out by non-State actors, the Working Group on Enforced or Involuntary Disappearances was not competent to deal with these cases. The Commission on Human Rights, therefore, in April 1994, established a special process on missing persons in the territory of the former Yugoslavia, a mandate which was entrusted to the author of the present report in his capacity as an expert member of the Working Group.[64] For various reasons, the special process could only in a few cases clarify the fate and whereabouts of these disappeared persons.[65] After the entry into force of the Dayton Peace Agreement, family members of disappeared persons submitted applications to the Human Rights Chamber which, however, declared itself in most cases incompetent ratione temporis to consider disappearances which

occurred before 14 December 1995. Only if there is reliable evidence that a disappeared person might still have been held incommunicado after this date, is the Chamber competent to consider this continuing human rights violation.

41. The leading case of such a disappearance is that of Avdo and Esma Palic against the Republika Srpska.[66] Mr. Avdo Palic was a well-known officer of the army of Bosnia and Herzogovina and commander of the detachment defending the Muslim enclave of Zepa against the Bosnian Serb forces. In July 1995, Colonel Palic negotiated with the Bosnian Serb army for the peaceful evacuation of the civilian population and was forcibly taken away by armed Serb soldiers in front of United Nations soldiers and monitors and taken in the direction of General Ratko Mladic's command position. While the authorities of the Republika Srpska claimed to have no knowledge of the arrest and detention of Colonel Palic, the Chamber heard evidence that he was seen in a military prison in Bijeljina up to September 1995 and that negotiations for his release were undertaken by high-level officials in spring 1996, albeit without success. The application was submitted by his wife on 18 November 1999 in her own right and on behalf of her husband. The Chamber found violations of articles 2, 3 and 5 of the European Convention in respect of Colonel Palic, and of articles 3 and 8 of the Convention in respect of his wife. In finding a violation of Article 3, the Chamber referred to the case law of the United Nations Human Rights Committee that prolonged incommunicado detention constitutes inhuman and degrading treatment per se. Similarly, it made reference to relevant decisions of the Human Rights Committee, the Inter-American Court and the European Court of Human Rights before establishing a violation in respect of the applicant. The finding of a violation of the right of Ms. Palic to respect for her family life is based on the argument that arbitrarily withholding information from her concerning the fate of her husband, including information concerning her husband's body, if he is no longer alive, constitutes a violation of her right to know about the fate of her husband deriving from article 8. As a remedy, the Chamber ordered the Republika Srpska "to carry out immediately a full investigation capable of exploring all the facts regarding Colonel Palic's fate from the day when he was forcibly taken away, with a view to bringing the perpetrators to justice; to release Colonel Palic, if still alive or, otherwise, to make available his mortal remains to Ms. Palic; and to make all information and findings relating to the fate and whereabouts of Colonel Palic known to Ms. Palic". Moreover, the Chamber ordered the Republika Srpska to pay Ms. Palic DM15,000, by way of compensation for her mental suffering, and in respect of her husband, DM50,000 by way of compensation for non-pecuniary damage.

42. The question of the right of family members to know the truth about the fate and whereabouts of disappeared persons was also discussed in the recent case of Dordo Unkovic against the Federation of Bosnia and Herzogovina.[67] The applicant lost contact with his daughter, her husband and their two sons, all Bosnian Serbs, in the summer of 1992 when the whole family was abducted from their home in Konjic by a group of armed men in uniform, taken to the outskirts of the town and killed with firearms. At that time, Konjic was under the control of the army of the Republic of Bosnia and Herzogovina. The applicant heard rumours that his daughter's family had been killed, but he did not receive any official information to confirm such rumours. In January 1999, he learned from newspapers that, already in 1992, two men had been arrested for killing his daughter's family. He submitted the application on his own behalf only and complained that the authorities had wilfully withheld information from him

between 1992 and 1999 concerning his daughter's fate and that that had caused him mental suffering, pain and sorrow. The Chamber found also in this case that "the apprehension, distress and sorrow caused to the applicant as a result of the respondent party failing to investigate and pursue the fate of the Golubovic family in a timely manner constitutes inhuman and degrading treatment in violation of his right protected by article 3 of the Convention", and ordered the Federation to pay him DM10,000, by way of non-pecuniary compensation for his mental suffering.

B. Development of specific instruments regarding disappearance

43. Since enforced disappearances are a relatively new phenomenon, the general human rights treaties at the international and regional levels, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People's Rights[68] and the Arab Charter on Human Rights,[69] do not contain a specific human right not to disappear or to be protected against enforced disappearance. Moreover, it has rightly been argued that this complex phenomenon was "conceived precisely to evade the legal framework of human rights protection".[70] When the international community started to take action against this phenomenon in the late 1970s, it was only natural to demand the creation of a new right with appropriate State obligations of a preventive and protective nature. Already in 1981, the Human Rights Institute of the Paris Bar Association convened a high-level colloquium for the promotion of an international convention on disappearance.[71] Then the impetus shifted to non-governmental organizations in Latin America, which prepared several draft declarations and conventions in the 1980s.[72] These drafts, together with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the case law of the United Nations Human Rights Committee and the Inter-American Court of Human Rights, as well as the practice of the Working Group on Enforced and Involuntary Disappearances, served as the basis for the parallel elaboration of a declaration in the framework of the United Nations and a convention in the framework of the OAS.

1. United Nations Declaration on the Protection of All Persons from Enforced Disappearance, 1992

44. After the French expert in the then Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Louis Joinet, had prepared a first draft in 1988,[73] the Commission elaborated a text which was adopted in 1992 by the General Assembly as the Declaration on the Protection of all Persons from Enforced Disappearance.[74] In the third preambular paragraph, the Declaration contains a working definition of enforced disappearances which is based on that of the Working Group on Enforced or Involuntary Disappearances. Article 1.2 states that any act of enforced disappearance places the persons subjected thereto outside the protection of the law and constitutes a violation of a number of human rights, such as the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. This feature of enforced disappearance as a cumulative human rights violation corresponds to the practice of the Working Group and the case law analysed above.

45. Like the Convention against Torture, the Declaration contains a variety of State obligations to take preventive action, to investigate any act of enforced disappearance and to bring the perpetrators to justice. Most important is the obligation in article 4 to make all acts of enforced disappearance criminal offences under domestic law with appropriate penalties which shall take into account their extreme seriousness. These acts shall be considered as continuing offences as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified (art. 17). Unlike the Convention against Torture, the Declaration does not establish the principle of universal jurisdiction.[75]

46. The Working Group on Enforced or Involuntary Disappearances, in accordance with relevant resolutions of the Commission on Human Rights, took up the task of monitoring States' compliance with the obligations deriving from the Declaration. It adopted a number of general comments interpreting provisions of the Declaration and drew the attention of Governments, especially in its country-specific observations and general recommendations, to specific problems and difficulties arising from State practice.[76] Since the provisions of the Declaration and the recommendations of the Working Group are not legally binding, only a few States have taken specific action to comply with them. Even the central obligation of enacting specific criminal legislation to prohibit every act of enforced disappearance was only implemented by some States, such as Colombia, Guatemala, Paraguay, Peru and Venezuela. Most Governments seem to believe that their legislation on the general criminal offences of abduction or kidnapping, which does not take into account the particularly serious nature of the crime of enforced disappearance, would be sufficient to comply with article 4 of the Declaration.

2. Inter-American Convention on Forced Disappearance of Persons, 1994

47. Already in 1987 the General Assembly of the OAS asked the Inter-American Commission on Human Rights to prepare a first draft of a convention,[77] and in 1988 the Commission submitted a fairly comprehensive and far-reaching draft.[78] While this draft was discussed and significantly amended in the Permanent Council's Committee on Juridical and Political Affairs, the adoption of the United Nations Declaration in 1992 helped, as one commentator has phrased it, "to extract the draft OAS Convention from the lethargy in which it was mired".[79] In June 1994, the OAS General Assembly finally adopted the Inter-American Convention on Forced Disappearance of Persons, the first legally binding instrument in this field.[80] In its sixth preambular paragraph, the Convention reaffirms that the systematic practice of forced disappearance of persons constitutes a crime against humanity, and in article II it provides a legal definition of forced disappearance which closely follows the working definition of the Working Group on Enforced or Involuntary Disappearance. Article IV is the central provision of the Convention as it obliges States parties to take measures to enact the crime of forced disappearance as defined in article II in its criminal legislation and to establish jurisdiction over such cases when the crime was committed within its jurisdiction, when the accused is a national of that State, when the victim is a national of that State (and that State sees fit to do so), and, moreover, "when the alleged criminal is within its territory and it does not proceed to extradite him". This provision can be interpreted as establishing universal jurisdiction among the member States of the OAS parties to the Convention.[81]

48. In addition, the Convention, like the Declaration, contains a number of State obligations to prevent enforced disappearance, to investigate the crime, to trace disappeared persons and to bring the perpetrators to justice. While the original draft of the Inter-American Commission on Human Rights had provided for rather far-reaching international monitoring mechanisms including urgent action procedures, article XIII of the Convention only stipulates that petitions or communications presented to that Commission alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights. In addition, article XIV foresees some kind of urgent and confidential tracing procedure similar to that developed by the Working Group on Enforced or Involuntary Disappearances. It was argued in the legal literature that "this is probably the weakest aspect of the Convention, as it adds little to current OAS procedures".[82] The Convention entered into force on 28 March 1996 and has been ratified by the following eight States: Argentina, Panama, Uruguay, Costa Rica, Paraguay, Venezuela, Bolivia and Guatemala.

3. Draft international convention on the protection of all persons from forced disappearance, 1998

49. Since the United Nations Declaration, as a non-binding instrument, had so had far only a marginal influence in reducing the practice of enforced disappearances, various non-governmental organizations and experts proposed strengthening the protection against disappearances by also adopting a convention in the framework of the United Nations. In fact, the preparations for such an international treaty date back as far as the Paris Colloquium of 1981. The rapporteur of this important colloquium, Louis Joinet,[83] was in fact, in his capacity as a member of the Sub-Commission and as Chairman-Rapporteur of its working group on the administration of justice, instrumental in the drafting of both the Declaration and the draft convention. On the basis of his draft, the Sub-Commission, in August 1998, adopted the draft international convention on the protection of all persons from forced disappearance.[84] The Commission requested the Secretary-General to ensure wide dissemination of this draft convention and to ask States and international and non-governmental organizations to submit their views and comments on this draft. Various Governments, international and non-governmental organizations responded to this invitation,[85] and the Working Group in 2000 explicitly welcomed this initiative and provided a comprehensive set of comments on the draft declaration.[86] In April 2001, the Commission decided to establish, at its fifty-eighth session, an inter-sessional open-ended working group of the Commission, with a mandate to elaborate, in the light of the findings of the independent expert (i.e. the present report), a draft legally binding normative instrument for the protection of all persons from enforced disappearance, taking into account, inter alia, the draft international convention on the protection of all persons from forced disappearance transmitted by the Sub-Commission in its resolution 1998/25.[87] In the interim period, it requested the independent expert to examine the existing international legal framework in preparation for the drafting activities of the inter-sessional working group which will meet after the fifty-eighth session of the Commission.

50. The draft convention is principally based on the United Nations Declaration on the Protection of All Persons from Enforced Disappearance[88] and contains substantive provisions aimed at increasing the level of protection with respect to this phenomenon. Article 3 differentiates between forced disappearance committed as part of a massive or systematic practice and that committed outside of such a context; thus, if forced disappearance is indeed

classified per se as being an international crime, it is only qualified as a crime against humanity when the actions involved are committed within the framework of a massive or systematic practice. Most important is the obligation in article 5 to define forced disappearance as a crime under domestic law, of a continuous and permanent character, corresponding to the serious and continuous nature of forced disappearance.[89] Like the Convention against Torture, it establishes the principle of universal jurisdiction (art. 69), but in a much clearer manner.[90] The draft convention also contains various provisions aimed at combating impunity and eradicating these practices and the factors which give rise to them. Article 17 prohibits granting amnesties and other such measures to those responsible for crimes of forced disappearance before such persons have been convicted by a court, which, according to article 10, can only be an ordinary court, to the exclusion of military tribunals. Article 18 addresses one of the most serious aspects of forced disappearance, namely, the abduction of children born during their mother's forced disappearance and their subsequent adoption.[91] Finally, the draft convention contains provisions relating to a monitoring mechanism and international procedures of supervision and protection adapted to the specificity and seriousness of the offence, inter alia an "international habeus corpus" procedure (art. 31).

51. Most of the comments received on the draft convention[92] are fairly supportive of or do not express any objections to the text. One Government even considered that it "would fill a legislative gap in the international system and would have a preventive effect in the process of eradicating this aberrant practice in various parts of the world". On the other hand, a few comments are rather negative, expressing either general doubts about the whole point of the draft convention, or concerns about several provisions contained in the draft to which some States could not subscribe.[93]

52. The expert will take the draft convention and the comments received by Governments and international and non-governmental organizations into account when identifying gaps in the present legal framework. In his conclusions, he will also make a few preliminary comments on the draft convention. He will, however, refrain from analysing the draft and commenting upon it in detail since this would, in his opinion, interfere with the work of the future inter-sessional working group.

V. INTERNATIONAL HUMANITARIAN LAW

A. In general

53. International humanitarian law is a set of rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. Its principal aim is to protect persons and property that are, or may be, affected by an armed conflict and to limit the rights of the parties to a conflict to use methods and means of warfare of their choice. The bulk of contemporary international humanitarian law rules are contained in the four Geneva Conventions of 1949 and in the two Additional Protocols to those Conventions of 1977.[94] The 1998 Rome Statute of the International Criminal Court, which includes war crimes within the subject matter of the future Court's jurisdiction, is expected to contribute significantly to a better implementation of international humanitarian law.[95]

54. International humanitarian law aims primarily to protect persons who do not, or are no longer taking part in hostilities. As their very titles indicate, the four Geneva Conventions are geared towards protecting wounded and sick members of the armed forces on land (the First Geneva Convention), wounded, sick and shipwrecked members of the armed forces at sea (the Second Geneva Convention), prisoners of war (the Third Geneva Convention) and individual civilians and civilian populations (the Fourth Geneva Convention). The definition of civilians[96] includes refugees, stateless persons, journalists and other categories of individuals who must be granted "protected person" status when they fall into the hands of an adverse party of which they are not nationals. The body of rules applicable to non-international armed conflict - which involves nationals of the same State - also protects all persons not taking, or no longer taking, part in the hostilities. The beneficiaries of international humanitarian law are thus persons who are or may be subject to the effects of an armed conflict.

55. While the aims of both international humanitarian law and human rights law are the same - protection of the life, liberty, health and dignity of individuals or groups of people - there are significant differences in the method by which they seek to ensure such protection based on the different circumstances of their application. For the purposes of this review, three features of international humanitarian law are of particular importance: (i) this body of law contains specific and often fairly detailed rules that parties to an armed conflict must implement upon the occurrence of such conflict; (ii) international humanitarian law unequivocally binds both State and non-State actors, so there is no ambiguity with respect to the legal obligations of the latter; (iii) there is no, and there cannot be any, derogation from the rules of international humanitarian law, as this body of law is precisely designed to deal with the inherently exceptional situation of armed conflict.

56. While international humanitarian law does not utilize the term "enforced disappearances" as such, there is no doubt that many of its provisions are aimed at preventing enforced disappearances in the context of armed conflict. The scope of international humanitarian law is, in fact, much broader, in that this body of law contains numerous rules applicable to persons who may be missing as a result of armed conflict, of which forcibly disappeared persons constitute only one category. Provided below is a very brief outline of international humanitarian law provisions relevant to enforced disappearances. The review is grouped around the primary composite violations constituting an act of enforced disappearance.

B. Protection of the right to life

57. A basic humanitarian law principle applicable to all persons who do not take a direct part or who have ceased to take a direct part in hostilities is humane treatment.[97] This principle implies that parties to a conflict must, inter alia, respect the person, honour and convictions of all those who do not take a direct part or who have ceased to take a direct part in hostilities. Moreover, all acts of violence to the life, health, physical or mental well-being of such persons - whether committed by civilian or military agents - are prohibited at any time and in any place whatsoever. Murder is specifically prohibited.[98] The ICC Statute confirms that wilful killing of protected persons in international armed conflict and violence to life and person, including murder of all kinds in non-international armed conflict, are war crimes.[99]

C. Protection from torture

58. The prohibition of torture, whether physical or mental, and other forms of cruel, inhuman or degrading treatment is also absolute under international humanitarian law applicable in both international and non-international armed conflicts.[100] It should be reiterated that torture is a war crime regardless of the official capacity of the perpetrator - State or non-State Agent - and that individuals may be held individually criminally responsible for this heinous act.[101] While beyond the scope of this review, it should be noted that international humanitarian law also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment, and that such acts also constitute war crimes.[102] Many humanitarian law rules are aimed at preventing or putting a stop to such treatment.

D. Protection of liberty and the right to a fair trial

59. Even though international humanitarian law does not use the terms "arbitrary arrest or detention" a large number of its provisions deal with possible reasons for depriving persons of liberty and with the procedural safeguards that must be observed in such cases. Different rules govern the detention of various categories of persons in international armed conflict, including prisoners of war,[103] persons entitled to prisoner-of-war treatment,[104] civilian internees,[105] persons subject to criminal procedures[106] and persons deprived of liberty for reasons related to the conflict who do not benefit from more favourable treatment under other provisions of the Geneva Conventions or Additional Protocol I thereto.[107] It should be noted that humanitarian law contains specific rules governing non-penal detention and very detailed provisions on judicial guarantees that must be observed when protected persons are put on trial for criminal offences. Thus, depriving a prisoner of war or other protected person of the rights of fair and regular trial is a war crime.[108]

60. Persons affected by a non-international armed conflict, whether interned or detained, or deprived of liberty for a criminal offence also enjoy protection under the relevant provisions of international humanitarian law. Article 3 common to the 1949 Geneva Conventions and Additional Protocol II are applicable to persons interned or detained for reasons related to the conflict.[109] While common article 3 also provides basic judicial guarantees,[110] Additional Protocol II sets out more detailed rules that must be observed in the prosecution and punishment of criminal offences related to the armed conflict.[111] Denial of judicial guarantees to persons taking no active part in hostilities arising from a non-international armed conflict is a war crime under the ICC Statute.[112]

E. Protection of family life

Family contacts and reunification

61. International humanitarian law aims to protect family life in international armed conflict by providing, as a general principle, that all persons in the territory of a party to the conflict or in a territory occupied by it shall be enabled to exchange news with family members.[113] Parties to the conflict must also facilitate inquiries made by family members dispersed due to the war, with the goal of renewal of contact between them and meetings if possible.[114] States also have a duty to facilitate family reunification and to encourage the work of humanitarian organizations

engaged in that task.[115] Additional provisions regulate the right of family contact of persons deprived of liberty (prisoners of war,[116] civilian internees[117]). In a situation of internal armed conflict, persons deprived of liberty, whether interned or detained, also have a right to maintain contact with their family.[118]

Right of families to know the fate of their relatives

62. Additional Protocol I provides unequivocally that the activities of States and international humanitarian organizations in the search for missing persons, and in dealing with the remains of deceased, is to be guided by the right of families to know the fate of their relatives.[119] The inclusion of this fundamental right was made by the drafters after careful reflection and in full consciousness.[120] The "search" referred to implies a duty to carry out a real investigation to establish the fate of a person reported missing by the adverse party.[121] Additional Protocol I also expanded the categories of persons whom a party to the conflict is obliged to keep records on and to search for,[122] but it should be noted that the obligation does not cover the (requested) party's own nationals. The mechanisms involved in information gathering and transmission include the national information bureaux that parties to international armed conflicts are obliged to establish,[123] as well as the ICRC Central Tracing Agency.[124]

63. There is no specific treaty provision requiring that a missing person be accounted for in non-international armed conflicts, but there is considerable practice indicating that such an obligation exists as a matter of customary law.[125] In practice, based on its right of initiative,[126] the ICRC Central Tracing Agency undertakes tracing activities regardless of the type of conflict - international or non-international - in which a person has been reported missing, as well as in situations of internal disturbances and tensions.

F. Protection of children

64. International humanitarian law also contains numerous provisions aimed at ensuring special protection for children affected by armed conflict, including provisions aimed at facilitating their identification[127] and at ensuring that they are not separated from their families[128] and that family reunification is facilitated should this happen.[129] Children deprived of liberty enjoy all the safeguards available to adults, including prohibition of the execution of the death penalty if the offence was committed when the child was below 18 years of age.[130]

VI. INTERNATIONAL CRIMINAL LAW

65. German Field Marshal Wilhelm Keitel was the first individual convicted by an international court for the crime of enforced disappearance, in connection with his role in implementing Adolf Hitler's night and fog decree.[131] Since enforced disappearances were not yet accepted as part of the concept of crimes against humanity at that time, the International Criminal Tribunal in Nurnberg convicted him for war crimes.[132] In the meantime, the concept of crimes against humanity has gradually emerged as a concept which, in times of peace as in times of war, establishes individual criminal responsibility for the most serious types of gross and systematic human rights violations in addition to the traditional concept of State responsibility. This development in international law is a response of the international community to the phenomenon of impunity, particularly in Latin America.[133] In view of the fact that enforced

disappearances belong to the most cruel human rights violations which constitute a direct attack on the life, liberty and dignity of the human being, it is not surprising that these acts were among the first to be recognized as crimes against humanity in the development of modern international criminal law. Already the draft conventions proposed at the Paris Colloquium of 1981 and by Fighting Against Forced Disappearances in Latin America (FEDEFAM) in 1982 suggested that enforced disappearances should be regarded as crimes against humanity.[134] One year later, the OAS General Assembly declared in a historic resolution that forced disappearance was "an affront to the conscience of the Hemisphere and constitutes a crime against humanity".[135] Whereas the Preamble to the 1992 United Nations Declaration only contains the compromise formulation that the systematic practice of enforced disappearance "is of the nature of a crime against humanity", the OAS Convention of 1994 confirms the regional principle according to which "the systematic practice of the forced disappearance of persons constitutes a crime against humanity". These differences are not only of a semantic nature, since certain legal consequences, such as the non-applicability of statutory limitations or the establishment of universal jurisdiction, depend on the legal qualification of acts of enforced disappearance in international criminal law.

66. In the meantime, international criminal law was further developed by the establishment of two ad hoc criminal tribunals, for the former Yugoslavia and for Rwanda, through resolutions of the United Nations Security Council.[136] Although enforced disappearances were committed on a large scale in both countries, this crime was not included in the Statutes of the two tribunals. But the International Law Commission (ILC) included these acts, because of their "extreme cruelty and gravity", in article 18 of its draft code of crimes against the peace and security of mankind, adopted after long negotiations in 1996.[137] This gradual development of international criminal law was finally concluded by the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998.[138]

67. According to article 7 of the ICC Statute, the following acts constitute crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ... (i) enforced disappearance of persons". Article 7.2 (i) of the Statute defines the crime of enforced disappearance as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".

68. The definition of the Rome Statute was further developed by the "Elements of crime" adopted by the Preparatory Commission for the ICC in 2000.[139] Accordingly, the crime against humanity of enforced disappearance of persons contains the following elements:

1. The perpetrator:

(a) Arrested, detained[140, 141] or abducted one or more persons; or

(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

3. The perpetrator was aware that:[142]

(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;[143] or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

69. The ICC Statute will enter into force after ratification by 60 States. At present, 46 States have deposited their instruments of ratification. Although the Rome Statute has not been adopted by consensus, one can assume that the long political and legal discussion about the nature and content of crimes against humanity in international criminal law has come to a certain conclusion. It has been finally decided that crimes against humanity apply equally in times of war and peace, and that acts of enforced disappearance, when committed as part of a widespread or systematic attack against a civilian population, constitute a crime against humanity. The definition of enforced disappearances follows by and large that of the Working Group on Enforced or Involuntary Disappearances but also includes crimes committed by non-State actors in the context of a "political organization", whatever this may mean. The subjective elements of guilt seem, however, to put an extremely heavy burden on the prosecution to prove that the individual perpetrator was aware from the very beginning of committing the crime that the deprivation of liberty would be followed by its denial and that he (she) intended to remove the victim from the protection of the law for a prolonged period of time.[144]

VII. DEFINITION OF ENFORCED DISAPPEARANCE

70. Both the case law and the various legal instruments outlined in this report show that enforced disappearance is a very complex and cumulative violation of human rights and humanitarian law which involves violations of the right to personal liberty and security, the right to recognition as a person before the law[145] and the right not to be subjected to inhuman and degrading treatment[146] and at least a grave threat to the right to life.[147] In addition, the disappeared person, by being intentionally removed from the protection of the law, is also deprived of other human rights, including the right to an effective remedy before a domestic authority and to the protection of family life. According to the working definition of the Working Group on Enforced or Involuntary Disappearances, which was by and large adopted in the United Nations Declaration and the Inter-American Convention, any act of enforced disappearance contains at least the following three constitutive elements:

(a) Deprivation of liberty against the will of the person concerned;

(b) Involvement of government officials, at least indirectly by acquiescence;

(c) Refusal to acknowledge the detention and to disclose the fate and whereabouts of the person concerned.[148]

71. The practice of enforced disappearance qualifies as a crime against humanity if:

(a) It is committed as part of a widespread or systematic attack directed against any civilian population;

(b) The perpetrator knew that the conduct was part of a widespread or systematic attack directed against a civilian population;

(c) The perpetrator was aware that the deprivation of liberty would be followed by a refusal to acknowledge it or to give information on the fate or whereabouts of the person concerned;

(d) The perpetrator intended to remove such person from the protection of the law for a prolonged period of time.

The crime against humanity of enforced disappearance can also be committed by persons acting in the context of a political organization, i.e. by non-State actors not acting in isolation.

VIII. IDENTIFICATION OF GAPS IN THE PRESENT LEGAL FRAMEWORK

A. Gaps and "full protection"

72. The Commission, in paragraph 11 of resolution 2001/46, requested the independent expert to identify gaps in the existing legal framework "in order to ensure full protection from enforced or involuntary disappearance". As indicators of "full protection", the expert takes into

account the relevant standards of protection developed by the Working Group on Enforced or Involuntary Disappearances and other expert bodies of the Commission, by the case law of the relevant international and regional treaty monitoring bodies and human rights courts, by the United Nations Convention against Torture, the United Nations Declaration on Disappearance, the Inter-American Convention on Disappearance, the draft United Nations convention on disappearance and in the relevant legal literature.

B. Definition

73. As was pointed out above, present international law contains different definitions of enforced disappearances. While international criminal law, as stipulated in the ICC Statute, also holds non-State actors - if they act in the context of a political organization - accountable for the crime of enforced disappearance, international human rights law up to now keeps to the traditional notion that only direct and indirect State actors are capable of committing this human rights violation. This view is reflected in the practice of the Working Group on Enforced or Involuntary Disappearances,[149] as well as in the definitions of enforced disappearance contained in the United Nations Declaration, the Inter-American Convention and even in article 1 of the draft convention. It is also in line with the traditional definition of torture laid down in article 1 of the Convention against Torture. Since one of the main aims of that Convention, as well as of any specific international instrument combating enforced disappearances, is to oblige States to use domestic criminal law against perpetrators of such practices, it is doubtful whether such a narrow definition should be maintained. The experience in many States, such as Colombia, shows that enforced disappearances are committed by government officials, indirect State actors such as members of death squads or so-called self-defence forces, guerrilla movements and paramilitary groups fighting the Government, as well as by members of organized criminal gangs, often in relation to drug-related offences. Since the concealment of all facts surrounding this crime is part of its definition, it is often very difficult to know whether the perpetrators acted with or without "the authorization, support or acquiescence of the State". This problem was also acknowledged by the drafters of the international convention on the protection of all persons from forced disappearances when referring, in article 1.2, to instruments containing "provisions of broader application".[150] In order to ensure "full protection" from enforced disappearance, a future binding instrument, at least in relation to domestic criminal law, should, therefore, equally apply to State and organized non-State actors.

74. On the other hand, international criminal law seems to define enforced disappearances in a very narrow manner which can only be applied in truly exceptional circumstances. Apart from the general requirement of crimes against humanity, which only covers acts committed as part of a widespread or systematic attack against a civilian population, perpetrators can only be convicted if the prosecutor establishes that they "intended to remove the victims from the protection of the law for a prolonged period of time".[151] This is a subjective element in the definition which in practice will be difficult to prove. The perpetrators usually only intend to abduct the victim without leaving any trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination. Often many perpetrators are involved in the abduction and not everybody knows what the final fate of the victim will be. In any case, if criminal law is to provide an effective instrument of deterrence, the definition of enforced disappearance in domestic criminal law, as required by a future international instrument, has to be broader than that included in the ICC Statute.

C. Concept of victims and human rights violated

1. The disappeared person

75. The act of enforced disappearance constitutes a multiple human rights violation. Article 1.2 of the United Nations Declaration states in this respect that any act of enforced disappearance "constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life". If one analyses the case law, however, this qualification of an act of enforced disappearance as a cumulative human rights violation is fairly controversial and depends to a great extent on the precise facts, which are, of course, difficult to establish. The only human rights violation which has been established in every case of enforced disappearance is the violation of the right to personal liberty. The right to personal security is already controversial, as only the United Nations Human Rights Committee seems to accord it a meaning independent from the right to personal liberty.[152] The right to recognition as a person before the law, as guaranteed in article 16 of the International Covenant on Civil and Political Rights and article 3 of the American Convention on Human Rights, but not, however, in the European Convention on Human Rights, is a fairly vague concept[153] and none of the judgements relating to enforced disappearances has in fact arrived at a violation of this right.[154] A violation of the right to life is usually only established if there are strong indications that the victim has actually died. The European Court of Human Rights originally even ruled that, after having found a violation of the right to personal liberty, it was no longer necessary to decide on the alleged violation of the right to life.[155] With respect to the right not to be subjected to inhuman treatment, there seem to be the strongest disagreements between the various treaty monitoring bodies and courts. While the United Nations Human Rights Committee takes the view that every prolonged incommunicado detention, irrespective of the actual treatment of the victim, constitutes inhuman treatment,[156] the European Court of Human Rights arrived at such a conclusion only in cases where there was evidence of torture or ill-treatment.[157] Similarly, the Inter-American Court of Human Rights, at least in Caballero-Delgado and Santana v. Colombia, denied a violation of the right to humane treatment on the grounds of "insufficient proof that those detained were tortured or subjected to inhumane treatment".[158] The Human Rights Chamber for Bosnia and Herzegovina, on the other hand, after original hesitations,[159] decided to follow the case law of the Human Rights Committee by declaring every case of enforced disappearance a violation of article 3 of the European Convention.[160]

76. This contradicting case law clearly reveals a gap in the protection against enforced disappearance. The minimum approach, which was at least originally applied by the European Court of Human Rights and which, in the absence of any further evidence, understands enforced disappearances as only an aggravated form of arbitrary detention, does not correspond to the extremely serious nature of this human rights violation. It seems, therefore, necessary either to establish a new, independent and non-derogable human right not to be subjected to enforced disappearance or to specify in a legally binding manner that every act of enforced disappearance, in addition to arbitrary deprivation of personal liberty, constitutes an act of inhuman treatment in violation of article 7 of the International Covenant on Civil and Political Rights and a violation of certain other human rights.

2. Family members

77. The question whether members of the family of a disappeared person are to be considered as victims under present international law, with independent rights deriving from this status, seems to be controversial too. That close relatives and friends, by the fact of enforced disappearance, are subjected to a situation of extreme anguish and stress which is usually intended by the perpetrators and which may last for many years, is not disputed and has been recognized in the practice of the Working Group on Enforced or Involuntary Disappearances, by the tracing activities of the ICRC, and in article 1.2 of the United Nations Declaration, which states that any act of enforced disappearance inflicts severe suffering on the persons subjected thereto and their families. Whether this amounts to an independent human rights violation is another matter. The Human Rights Committee, in the landmark case of Quinteros Almeida v. Uruguay, already in 1983 decided that "the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts" rendered her a victim of violations of the Covenant suffered by her daughter too, in particular article 7.[161] In later decisions, however, the Committee has not repeated the finding of such violations. The Inter-American Court of Human Rights, for the first time, in a judgement of 1988, recognized that "the circumstances of such disappearance generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate", which justified considering the family members as victims of inhuman treatment.[162] At the same time, the European Court started to rule on disappearance cases and, since its first judgement in the Kurt case, has usually found violations of article 3 of the European Convention on Human Rights in relation to the families (but not to the disappeared persons).[163] In a recent judgement, the European Court felt, however, a need to relativize this finding by stating that the "Kurt case does not however establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to article 3".[164] The Human Rights Chamber for Bosnia and Herzegovina, on the other hand, developed the victim concept further by finding the wife of a disappeared person not only a victim under article 3 but also article 8 of the European Convention.[165] This interpretation of the right to the protection of family life seems to correspond to the emphasis put on the right of family members under international humanitarian law.[166]

78. If one considers the next of kin of disappeared persons as independent victims of human rights violations, certain legal consequences arise which are usually referred to as "the right to the truth".[167] When the Human Rights Committee found the mother of a disappeared person to be a victim under article 7 of the International Covenant on Civil and Political Rights, it also stated that she "has the right to know what has happened to her daughter".[168] The right to the truth is, however, still a fairly vague concept in international law. Explicitly, the "right of families to know the fate of their relatives" is only recognized in article 32 of Additional Protocol I to the Geneva Conventions, i.e. only in the context of an international armed conflict in respect of nationals of the other party.[169] In practice, the ICRC Central Tracing Agency undertakes tracing activities also in cases of non-international armed conflict and internal disturbances and tensions, and there is practice indicating the existence of a corresponding obligation under customary humanitarian law.

79. Under international human rights law, the concept of the right to the truth is only slowly evolving in the context of the development of the right to a remedy and reparation for gross and systematic human rights violations, both as a matter of jurisprudence and of standard setting.[170] The case law of all the treaty monitoring bodies and courts relating to enforced disappearances analysed above indicates that the Governments concerned are under some obligation to provide the victims, including the families as far as applicable, with an effective remedy, which may include the duty to investigate the act of disappearance, to bring the perpetrators to justice, to pay compensation to the victims, to release the disappeared persons (if still alive) or to locate and identify the mortal remains and deliver them to the next of kin, and to make all information and findings relating to the fate and whereabouts of the disappeared person available to the families. These obligations seem, however, to be far from generally accepted and have partly been derived from provisions of substantive human rights law (such as the right to life and prohibition of torture),[171] partly from the general obligation under human rights treaties to secure human rights,[172] partly from the right to an effective domestic remedy,[173] and partly in the exercise of specific powers of international bodies to afford just satisfaction or other remedies.[174]

80. In view of the fact that the relevant jurisprudence is by no means unanimous, that the right of the families to know the truth about the fate and the wherabouts of their loved ones is not explicitly laid down in any international or regional human rights treaty, and that the various attempts to specify the precise legal consequences of such a right in the context of the right to a remedy and reparation seem to be very controversial, one can conclude that there exists a major gap in this area. Any future binding instrument on enforced disappearances should precisely define the concept and the legal consequences of the right of family members of disappeared persons to the truth.

D. Safeguards against impunity

81. As the Working Group on Enforced or Involuntary Disappearances and the Commission on Human Rights have repeatedly emphasized, impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to the elucidation of cases thereof.[175] There can, therefore, be no doubt that "full protection" from enforced disappearance must include appropriate measures under criminal law. This was also recognized when the international community qualified enforced disappearance as a crime against humanity.[176] As the definition of enforced disappearance in the ICC Statute shows, only very few cases of a particularly serious, well-planned and systematic nature will finally be prosecuted by the ICC. To achieve the desired deterrent effect, States will have to include the crime of enforced disappearance with an appropriate punishment in their domestic criminal codes, as required by article 4 of the United Nations Declaration of 1992. Since the Declaration is a non-binding instrument, only very few States, in the majority Latin American States parties to the Inter-American Convention on Forced Disappearance of Persons, have adopted relevant criminal legislation, and only very few perpetrators of this crime have so far been brought to justice. The absence of a binding international obligation, similar to article 4 of the Convention against Torture or articles 2 to 5 of the draft convention on disappearances, therefore constitutes a major gap in the present legal framework.

82. In view of the particularly serious nature of the crime of enforced disappearance, any binding international instrument established in accordance with the relevant recommendations of the Working Group on Enforced or Involuntary Disappearances and provisions of the United Nations Declaration, the Inter-American Convention on Forced Disappearance of Persons and the draft convention, should provide the following:

Any act of enforced disappearance shall be considered a continuing crime as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared person and the facts remain unclarified;

The principle of universal jurisdiction shall apply to any act of enforced disappearance;

No order or instruction of any public authority may be invoked to justify an act of enforced disappearance;

No statutory limitation shall apply to the crime of enforced disappearance;

Perpetrators shall not benefit from any specific amnesty law or similar measure;

No privileges, immunities or special exemptions shall be granted in trials relating to such acts;

Perpetrators shall be tried only in courts of general jurisdiction and in no case by military courts;

Enforced disappearance shall not be considered a political offence for the purposes of extradition, asylum and refuge;

The prohibition of refoulement shall also apply to the danger of being subjected to enforced disappearance.

E. Prevention

83. In addition to criminal repression, a number of preventive measures have been suggested by the Working Group and were subsequently incorporated in the United Nations Declaration, the Inter-American Convention on Forced Disappearance of Persons and the draft convention. In fact, the Working Group has repeatedly stressed that nobody would have to disappear any more if most of the suggested preventive measures were applied by States.[177] In the absence of a binding treaty at the universal level, the lack of the following minimum obligations must be considered as a gap as compared to "full protection":

The absolute prohibition of any form of incommunicado detention;

The obligation to establish domestic legal rules indicating those officials authorized to order deprivation of liberty;

The effective right to habeas corpus and other guarantees against arbitrary detention;

The obligation to ensure the investigation of any complaint of enforced disappearance by an independent State authority;

The right of family members to a prompt, simple and effective judicial remedy in cases of enforced disappearance;

The establishment and maintenance of an official and generally accessible up-to-date register of all detainees at every place of detention and of centralized registers of all places of detention;

The absolute prohibition of secret places of detention;

The right of access to any place of detention by an independent State authority;

The release of all detainees in a manner permitting reliable verification;

The liability of the perpetrators of enforced disappearance under civil law;

The appropriate training of law enforcement and prison personnel.

F. Right to reparation

84. The draft "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" at present under consideration by the Commission on Human Rights[178] distinguish between the procedural right to an effective remedy and the substantive right to reparation of victims. Reparation shall be proportional to the gravity of the violations suffered and the resulting damage, and shall include measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In the case of enforced disappearance, which is a particularly serious and continuing human rights violation committed with the very intention of evading responsibility, truth and legal remedies, reparation is of the utmost importance, not only as a matter of redress for the individual victims, but also as a pre-condition for establishing truth, justice and peace in the societies affected by such practices.

85. The concept of victims in cases of enforced disappearance encompasses, as the case law clearly shows, the disappeared persons as well as their relatives.[179] Reparation must, therefore, be provided to both types of victim. Since the question of whether the disappeared person is still alive or has been killed often remains unanswered, the measures of reparation shall be designed in a way that they can be applied to both the disappeared person and the relatives.

86. Restitution means that the disappeared person, if still alive, must be immediately released. If he or she had been killed, restitution includes the exhumation and identification of the body and the restoration of the mortal remains to the next of kin for the purpose of a decent burial in accordance with the religious practices of the victim and the family.

87. A decent burial can also be regarded as a form of moral or social rehabilitation of the victim. If disappeared persons have survived and finally escape or are released, they usually suffer from post-traumatic stress disorders which require, as a matter of rehabilitation, extensive medical, psychological and social care and treatment at the expense of the Government responsible. The families, who often for many years have attempted, by various legal, political and other means, to establish the fate and whereabouts of their loved ones, also have a valid claim to rehabilitation, by means of legal and social services, and often they are also in need of medical and psychological care as a result of their suffering.

88. Satisfaction is a very broad category of reparations which is of particular significance in cases of enforced disappearance. It starts with an apology by the authorities or the Government concerned and the disclosure of all relevant facts at the disposal of the authorities. If the Government is not in possession of the relevant facts (because of lack of control of security forces or because the disappearance occurred under a previous government), it is under an obligation to carry out an in-depth investigation by all appropriate means, including exhumations, to establish the truth about the fate and whereabouts of the disappeared persons and about the perpetrators of the disappearance. This can be achieved by ordinary criminal investigations or by the establishment of special investigative bodies entrusted with searching for disappeared persons, truth commissions, etc. In addition to establishing the truth and providing information to the victims and society at large, the authorities are also under an obligation to bring the perpetrators to justice. As the Human Rights Committee rightly concluded, in the case of particularly serious human rights violations, such as enforced disappearances, justice means criminal justice, and purely disciplinary and administrative remedies cannot be deemed to provide sufficient satisfaction to the victims.[180] Perpetrators of enforced disappearance should, therefore, not benefit from amnesty laws or similar measures.[181] Further measures of satisfaction include public commemorations to pay tribute to the victims and thereby contribute to the process of building justice and peace.[182]

89. Guarantees of non-repetition start with the cessation of continuing violations. In the case of enforced disappearance, the human rights violation only stops when the fate and whereabouts of the disappeared person are considered clarified beyond reasonable doubt. If a Government is willing to disclose all information concerning past disappearances and to carry out the necessary investigations to establish the truth, such measures usually also provide certain guarantees of non-repetition. Most important, however, is that States include the act of enforced disappearance as a criminal offence with appropriate punishment in their criminal code,[183] that they actually bring the perpetrators to justice and that they adopt the necessary preventive measures, as discussed above.

90. Often, pecuniary compensation for legal costs as well as for material and non-material damage remains, unfortunately, the only form of reparation to the victims of enforced disappearance in practice. If a disappeared person is released after a couple of years or is killed, compensation for material damage, such as loss of income or opportunities, might amount to a substantial sum of money as, above all, various judgements of the Inter-American Court of Human Rights show.[184] Similarly, the mental and physical suffering of both the disappeared persons and the relatives might require the Governments concerned to pay considerable sums of compensation for non-material or moral damage.

91. Many of the principles relating to the right of reparation in cases of enforced disappearance are in the process of being developed by the case law of the various monitoring bodies and courts and in the framework of the Commission's draft principles and guidelines. It would, however, be premature to allege that the right to reparation in cases of enforced disappearance and its precise content are firmly established in existing international law. On the contrary, this is a topic of considerable debate, and the drafting of a legally binding instrument on enforced disappearance in the near future might contribute to the evolving concept of a right to reparation for gross violations of human rights.

G. Protection of children

92. Experience shows that children are often particularly affected by the crime of enforced disappearance. They suffer most if their mother, father or even both parents disappear, and they may live all their childhood in a constant situation of uncertainty, between hope and despair. Sometimes, a woman may give birth to a child during her disappearance, and the child is taken away from her and made the subject of adoption by the same authorities who are responsible for the disappearance of the mother. In Argentina and other South American countries, such forced separations and adoptions of children were practised systematically.[185] These criminal practices, in addition to causing immense suffering to the children and their parents, also lead to considerable conflicts of interest between persons who adopt these children in good faith and members of the families of the disappeared parents. Specific instruments, such as the Convention on the Civil Aspects of International Child Abduction,[186] only allow for a very partial response to the human rights aspects of these practices.

93. Consequently, the United Nations Declaration, the Inter-American Convention on Forced Disappearance of Persons and the draft convention contain specific provisions dealing with these problems. Article 20.3 of the Declaration, for example, provides that "the abduction of children of parents subjected to enforced disappearance or of children born during their mother's enforced disappearance, and the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such". States shall devote special efforts to the search for and the restitution of such children to their families of origin and shall allow for the annulment of any adoption which originated in enforced disappearance. Since these practices often resulted in inter-country adoptions, States should conclude appropriate bilateral or multilateral agreements.

94. In view of the extreme seriousness of these problems, one must speak of a gap in the present legal system which should be addressed in a universal and legally binding instrument.

IX. CONCLUSIONS AND RECOMMENDATIONS

95. Enforced disappearance is one of the most serious human rights violations, which, if committed as part of a widespread or systematic attack against civilians, constitutes a crime against humanity. As the annual reports of the Working Group on Enforced or Involuntary Disappearances to the Commission show, enforced disappearance can be considered a universal phenomenon, which continues today to be practised systematically in a considerable number of countries. The crime of enforced disappearance is not only directed against the disappeared persons but equally against their families, friends and the society they live in. Often, the

disappeared persons are killed immediately, but their children, parents or spouses continue to live for many years in a situation of extreme insecurity, anguish and stress, torn between hope and despair. They must, therefore, also be considered as victims of enforced disappearance.

96. In view of the extreme seriousness of this human rights violation, various measures have been taken in response by the international community at the universal and regional levels, and certain standards have been developed in the framework of international human rights, humanitarian and criminal law. At the same time, it must be recognized that protection against enforced disappearance is a slowly developing concept, with many gaps, disputed questions and uncertainties. Until today, no specific human right not to be subjected to enforced disappearance has been recognized, although this human rights violation has occurred on a systematic scale for almost 30 years. It is generally considered to be a multiple human rights violation, but there is no agreement on which human rights, apart from the right to personal liberty, are actually violated by an act of enforced disappearance. The various attempts at defining enforced disappearances in international human rights and criminal law differ from each other. Although there seems to be general agreement that enforced disappearances need to be combated by relevant measures under domestic criminal law (including the principle of universal jurisdiction) and by a broad variety of preventive measures, no legally binding universal obligations exist in this respect. Since the protection of international criminal law will only apply in exceptional cases, universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future. Finally, there exist many gaps in respect of concrete measures of prevention (such as the obligation to maintain centralized registers of all places of detention and all detainees) and in respect of the right of disappeared persons and their families to an effective remedy and to reparation.

97. The gaps in the present international legal framework outlined in the present report clearly indicate the need for a "legally binding normative instrument for the protection of all persons from enforced disappearance", as referred to in paragraph 12 of Commission resolution 2001/46. Such a legally binding normative instrument might take one of the following forms:

A separate human rights treaty, such as the draft convention;

An optional protocol to the International Covenant on Civil and Political Rights; or

An optional protocol to the Convention against Torture.

98. The independent expert considers it part of the mandate of the future inter-sessional open-ended working group of the Commission to be established in accordance with paragraph 12 of Commission resolution 2001/46 to decide which of the three alternatives indicated above to give priority to. Since the expert has, however, been requested by the Commission to take into account the draft convention, as well as the comments of States, intergovernmental and non-governmental organizations, he wishes to state briefly his views on the advantages and disadvantages of the three options.

99. A separate international convention on the protection of all persons from enforced disappearance would certainly be most appropriate for drawing the attention of States to the extreme seriousness of this human rights violation and for enumerating the various and detailed State obligations relating to criminal action, preventive measures, remedies and reparation. On the other hand, as many comments of Governments show, the adoption of a specialized human rights treaty would contribute to a further proliferation of human rights treaties and treaty monitoring bodies.[187] Such proliferation of monitoring bodies and the related costs might be avoided either by entrusting the monitoring function to the Working Group on Enforced or Involuntary Disappearances or to any of the existing treaty monitoring bodies. The first option, which some members of the Working Group might favour, has the disadvantage of mixing special procedures of the Commission with treaty monitoring. For the Working Group, which has always stressed the humanitarian nature of searching for disappeared persons, treaty monitoring by means of, for instance, deciding on individual complaints, might interfere with its major and primary humanitarian tasks. Of all the existing treaty monitoring bodies, only the Committee against Torture and the Human Rights Committee seem to carry out functions similar to those expected from a future "committee on disappearance".

100. An optional protocol to the Convention against Torture would have the advantage that that Convention has served as a model for the United Nations Declaration, the Inter-American Convention on Forced Disappearance of Persons and the draft convention. The main aims of a binding legal instrument on enforced disappearance would be similar to those of the Convention against Torture: effective domestic criminal legislation including universal jurisdiction, effective measures of prevention and reparation. Many of the preventive obligations laid down in the Convention against Torture, such as human rights education for law enforcement personnel, the duty to carry out a prompt and impartial investigation or the right to a remedy and reparation, also have a preventive effect on disappearances. In addition, many disappeared persons are subjected to torture, and the Human Rights Committee considers every prolonged incommunicado detention as inhuman treatment. Consequently, the Committee against Torture might be considered as the treaty monitoring body with the most relevant experience in combating enforced disappearance. Since this Committee, under article 20 of the Convention against Torture, is already entrusted with the function of carrying out confidential inquiry proceedings, including possible on-site visits, this procedure might be also used for investigating cases of enforced disappearance. On the other hand, enforced disappearance is a much broader concept, which involves human rights violations that at present are not covered by the mandate and expertise of the Committee against Torture. In addition, it might be argued that a Committee of only 10 experts, which might in the near future also be responsible for supervising or even carrying out preventive visits to places to detention in accordance with the draft optional protocol to the Convention against Torture now under consideration by the Commission, might not be in a position to undertake major additional tasks, such as monitoring enforced disappearances.

101. An optional protocol to the International Covenant on Civil and Political Rights would have the advantage that enforced disappearance constitutes a multiple violation of human rights which are all covered by the Covenant. Consequently, the Human Rights Committee already has the required expertise relating to the various aspects of enforced disappearance, which is underlined by its rich case law on this topic. In addition, this 18-member expert body has a particularly high reputation and disposes of sufficient time and resources to deal with an

additional monitoring task. On the other hand, the capacities of the Human Rights Committee to take up an additional monitoring task will depend on the precise functions entrusted to the Committee under a future optional protocol on enforced disappearance. The additional monitoring of this human rights violation in the context of the State reporting and individual and inter-State communication procedures will not pose an excessive additional burden as these functions have partly already been implemented by the Human Rights Committee with respect to disappearances. A future binding instrument on enforced disappearance should, however, go beyond these traditional monitoring procedures and also include, for instance, special mechanisms for the tracing of disappeared persons, an inquiry procedure with visits to the territory of States parties and possibly also preventive visits to, or at least monitoring of, places of detention.[188]

102. While all three options seem to have certain advantages and disadvantages, the independent expert concludes that, under the assumption that Governments wish to avoid a further proliferation of treaty monitoring bodies, the Human Rights Committee might be in the best position to undertake the additional task of monitoring States' compliance with their obligations to prevent disappearances, to investigate cases of disappearance and to bring the perpetrators to justice, and to provide effective remedies and reparation to the victims of disappearance. Since the capacity of the Human Rights Committee to take up such additional functions will depend, to some extent, on the exact nature of the monitoring procedures to be established, the future inter-sessional working group of the Commission might perhaps be best advised to agree first on the relevant substantive and procedural obligations of States parties, as well as on the appropriate monitoring mechanisms, and only at the end to decide, in close consultation with the treaty monitoring bodies, who shall be entrusted to carry out these tasks.

Notes

[1] See International Committee of the Red Cross, Restoring FAMILY links - a guide for National Red Cross and Red Crescent Societies, Geneva 2000; see also section V.E.2 of the present report.

[2] See Christopher K. Hall, "Enforced disappearance of persons", in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Baden-Baden 1999, p. 151, with further references.

[3] See Wilder Tayler, "Background to the elaboration of the draft international convention for the protection of all persons from forced disappearance", ICJ Review No. 62-63, September 2001, p. 63.

[4] E/CN.4/1188, para. 103.

[5] Direccion de Intelegencia Nacional, the main Chilean security agency.

[6] Le Monde, 28 and 29 December 1975.

[7] See E/CN.4/2002/79. See also para. 15, below.

[8] See E/CN.4/2001/68 and E/CN.4/2000/64.

[9] See Annual Report of the Inter-American Commission on Human Rights, 1974, OEA/Ser.L/V/II.34, Doc. 31 Rev.1, of 30 December 1974; see also Wilder Tayler, note 3, above.

[10] See OAS document AG/Res.443 (IX-0/79), para. 3; cf. Reed Brody and Felipe Gonzales, An Analysis of International Instruments on "Disappearances", Human Rights Quarterly, vol. 19, 1997, p. 365 (368).

[11] See Iain Guest, Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations, Philadelphia, 1990; Thomas Buergenthal and Dinah Shelton, Protecting Human Rights in the Americas: Cases and Materials, 4th revised edition, Kehl/Strasbourg/Arlington 1995, pp. 304 et seq.

[12] See OAS document AG/Res.510 (X-01/80), in Proceedings: Tenth Regular Session, 1981.

[13] See Brody and Gonzales, note 10, above.

[14] OAS, AG/Res.443 (IX-0/79), para. 5.

[15] See OAS, AG/Res.666 (XIII-0/83), in Proceedings: Thirteenth Regular Session, 1983.

[16] See Commission on Human Rights resolution 4 (XXXI) of 13 February 1975.

[17] See General Assembly resolution 3450 (XXX) of 9 December 1975.

[18] See General Assembly resolution 32/128 of 16 December 1977, entitled "Missing persons in Cyprus".

[19] See General Assembly resolution 3448 (XXX) of 9 December 1975. See also Commission resolution 3 (XXXII) of 19 February 1976.

[20] See the reports of the Ad Hoc Working Group on the situation of human rights in Chile, A/10285 of 7 October 1975, E/CN.4/1188 of 4 February 1976, A/31/253 of 8 October 1976 and E/CN.4/1221 of 10 February 1977.

[21] General Assembly resolution 32/118 of 16 December 1977, para. 2.

[22] See General Assembly resolution 33/173 of 20 December 1978.

[23] See Commission on Human Rights resolution 11 (XXXV) of 6 March 1979, para. 6 (b).

[24] A/34/583/Add.1 of 21 November 1979. See also his reports to the Commission, E/CN.4/1363 of 2 February 1980 and E/CN.4/1381 of 9 April 1980.

[25] A/34/583/Add.1, paras. 165 and 177.

[26] Ibid., para. 178.

[27] Ibid., paras. 193 et seq.

[28] Ibid., para. 5.

[29] Commission on Human Rights resolution 20 (XXXVI) of 29 February 1980, para. 1.

[30] First report of the Working Group on Enforced or Involuntary Disappearances to the Commission E/CN.4/1435 of 26 January 1981, para. 30.

[31] The revised version of the Working Group's methods of work is contained in its latest report to the Commission (E/CN.4/2002/79).

[32] Adopted by the United Nations General Assembly in resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976; on 26 November 2001, 147 States were parties to it.

[33] See, inter alia, Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, Oxford 1991; Manfred Nowak, U.N. Covenant on Civil and Political Rights - CCPR Commentary, Kehl/Strasbourg/Arlington, 1993.

[34] General comment 6/16 of 27 July 1982.

[35] Bleier v. Uruguay, Communication No. 30/1978, final views of 29 March 1982.

[36] Quinteros Almeida v. Uruguay, Communication No. 107/1981, final views of 21 July 1983.

[37] See Manfred Nowak, "Monitoring disappearances - the difficult path from clarifying past cases to effectively preventing future ones", European Human Rights Law Review, 1996, p. 348 (352 et seq.); Federico Andreu-Guzman, "The draft international convention on the protection of all persons from forced disappearance", ICJ Review, No. 62-63, September 2001, p. 73 (75 et seq.).

[38] Sanjuan Arevalo v. Colombia, Communication No. 181/1984, final views of 3 November 1989.

[39] Mojica v. Dominican Republic, Communication No. 449/1991, final views of 15 July 1994.

[40] Bautista de Arellana v. Colombia, Communication No. 563/1993, final views of 27 October 1995.

[41] Laureano v. Peru, Communication No. 540/1993, final views of 16 April 1996.

[42] Monaco and Vicario v. Argentina, Communication No. 400/1990, final views of 3 April 1995.

[43] Concluding observations of the Human Rights Committee on the report of Algeria, CCPR/C/79/Add.95, 18 August 1998.

[44] Adopted on 21 November 1969 by the Inter-American Specialized Conference on Human Rights, which met in San José from 7 to 22 November 1969. The Convention entered into force on 18 July 1978. Until now, 24 member States of the OAS have ratified the Convention and 20 States have accepted the jurisdiction of the Inter-American Court.

[45] See, for example, Buergenthal and Shelton, note 11 above, pp. 149 et seq.

[46] Velásquez Rodriguez v. Honduras, Petition No. 7920/1981, Judgement of 29 July 1988.

[47] Godinez Cruz v. Honduras, Petition No. 8097/1982, Judgement of 20 January 1989.

[48] Caballero-Delgado and Santana v. Colombia, Petition No. 10.319/1989, Judgement of 8 December 1995.

[49] Caballero-Delgado and Santana v. Colombia, Judgement on reparations of 29 January 1997.

[50] Blake v. Guatemala, Petition No. 11.219/1993, Judgement of 24 January 1998.

[51] Villigran Morales and Alcase v. Guatemala, Petition No. 11.383/1994, Judgement of 19 November 1999.

[52] Bamaca Velasquez v. Guatemala, Petition No. 11.129/1993, Judgement of 25 November 2000.

[53] In this respect, see the Legal Brief Amicus Curiae presented by the International Commission of Jurists before the Inter-American Court of Human Rights in the case of Bacam Velasquez v. Guatemala, in ICJ Review No. 62-63, September 2001, pp.127-158.

[54] Durand and Ugarte v. Peru, Petition Nos. 10.009 and 10.078/1987, Judgement of 16 August 2000.

[55] See in this respect the "partially dissenting opinion of Judge de Roux Rengifo" on the Durand and Ugarte case, note 54 above.

[56] Trujillo Oroza v. Bolivia, Judgement of 26 January 2000; along the same lines, see Caracazo v. Venezuela, Judgement of 11 November 1999.

[57] The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953; its Protocol No. 11 entered into force on 1 November 1998; as of 26 November 2001, 41 States were parties to the Convention. On the jurisprudence of the European Court see, inter alia, Pieter van Dijk and Fried van Hoof, Theory and Practice of the European Convention on Human Rights, 3rd edition, The Hague, 1998; Philip Leach, Taking a Case to the European Court of Human Rights, London, 2001.

[58] Kurt v. Turkey, Application No. 24276/94, Judgement of 25 May 1998.

[59] Kaya v. Turkey, Application No. 22535/93, Judgement of 28 March 2000.

[60] Tas v. Turkey, Application No. 24396/94, Judgement of 14 November 2000.

[61] Cicek v. Turkey, Application No. 25704/94, Judgement of 27 February 2001.

[62] Cyprus v. Turkey, Application No. 25781/94, Judgement of 10 May 2001.

[63] See, for example, e.g., Manfred Nowak, "Individual complaints before the Human Rights Commission for Bosnia and Herzegovina", in Gudmundur Alfredsson et al. (eds.), International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th. Möller, The Hague/Boston/London, 2001, p. 771 with further references.

[64] See Commission resolutions 1994/39 of 4 March 1994 and 1994/72 of 9 March 1994.

[65] See the reports of the expert, E/CN.4/1995/37, E/CN.4/1996/36 and E/CN.4/1997/55.

[66] Palic v. Republika Srpska, Case No. CH/99/3196, Decision on admissibility and merits of 11 January 2001.

[67] Unkovic v. Federation of Bosnia and Herzogovina, Case No. CH/99/2150, Decision on admissibility and merits of 9 November 2001.

[68] Adopted on 27 June 1981 by the Conference of Heads of State and Government of the Organization of African Unity (OAU) in Banjul; entered into force on 27 October 1986; ratified by all 53 member States of the OAU/African Union.

[69] Adopted on 15 September 1994 by the Council of the League of Arab States; has not yet entered into force.

[70] See Tayler, note 3 above, p. 65.

[71] See the text of the draft convention prepared by the Institut des droits de l'homme du Barreau de Paris, in Le refus de l'oubli: La politique de disparition forcée, Colloque janvier/février 1981, p. 313. On the history of these standard setting activities see also Reed Brody, Commentary on the Draft United Nations "Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances", Netherlands Quarterly of Human Rights, vol. 8, 1990, p. 381; Brody and Gonzales, note 10 above, pp. 371 et seq.; Tayler, note 3 above; Nowak, note 37 above, pp. 350 et seq.

[72] See "Projet de la Ligue argentine des droits de l'homme" in Le Refus de l'oubli, 1981, note 71 above; FEDEFAM adopted a draft convention at its annual congress in Peru, 1982; in 1986, a draft declaration was adopted by the first Colloquium on Forced Disappearances convened by the José Alvear Restepo Lawyers Collective of Bogota; in 1988, FEDEFAM and the Grupo de Iniciativa (a consortium of Argentine NGOs) convened an international meeting in Buenos Aires from which a new draft convention emerged, see "La desaparicion, crimen contra la humanidad", Colloquium of Buenos Aires, 1988, p. 343. See also Brody and Gonzales, note 10 above, pp. 369 et seq.

[73] See E/CN.4/Sub.2/1988/17.

[74] See United Nations General Assembly resolution 47/133 of 18 December 1992. On the Declaration, see Nigel Rodley, "The UN Declaration on the Protection of all Persons from Enforced or Involuntary Disappearances", Working paper 1 (doc. CEJE 022) presented to the International Conference on Political Killings and Disappearances, organized by the Netherlands Section of Amnesty International in Amsterdam from 4 to 6 September, 1992; Brody, note 71 above; Nowak, note 37 above, pp. 350 et seq.; Brody and Gonzales, note 10 above, pp. 371 et seq.

[75] But see Rodley, note 74 above, who argues that the second sentence of article 14, together with article 16.3 lays down the principle of permissive universal jurisdiction. Similar Brody and Gonzales, note 10 above, p. 391, who maintain that this was the "compromise hammered out at the inter-sessional working group".

[76] See, for example, the 2001 report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/2002/79.

[77] See OAS document AG/Res. 890 (XVII-0/87), the OAS General Assembly itself was acting on a suggestion from the Inter-American Commission on Human Rights, see Annual Report of the Inter-American Commission on Human Rights, OAS document OEA/Ser.P/AG/doc.2167/87, 1987; see also Brody and Gonzales, note 10 above, p. 374; Tayler, note 3 above, p. 66.

[78] See Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OAS Doc. OEA/Ser.L/V/II.74, Doc.10 rev.1, of 16 September 1988.

[79] See Tayler, note 3 above, p. 67.

[80] The Convention was adopted on 9 June 1994 in Belem do Para, entered into force on 28 March 1996 and has been ratified so far by eight OAS member States; see OAS document OEA/Ser.P/Doc.3114/94. On the Convention see Brody and Gonzales, note 10 above.

[81] See Nowak, note 37 above, p. 352; Brody and Gonzales, note 10 above, p. 392 and footnote 138.

[82] Brody and Gonzales, note 10 above, p. 401.

[83] See his report in Le refus de l'oubli, note 71 above, p.293.

[84] See resolution 1998/25 of the Sub-Commission on the Promotion and Protection of Human Rights, of 28 August 1998. The report of the sessional working group on the administration of justice (E/CN.4/Sub.2/1998/19), of 19 August 1998, to which the text of the draft convention is annexed, provides a good background to this drafting exercise. On the draft convention see also Andreu-Guzman, note 37 above; Tayler, note 3 above. See also International Commission of Jurists, Final Report on the Meeting on the Draft International Convention on the Protection of All Persons from Forced Disappearance (Geneva, 4-5 October 2000).

[85] See these comments in document E/CN.4/2001/69 and Add.1.

[86] See E/CN.4/2001/68, annex III.

[87] See Commission resolution 2001/46, para. 12.

[88] But the working group on the administration of justice took also into account the Inter-American Convention on the Forced Disappearance of Persons, the Convention against Torture, other international instruments and the practice of the Working Group on Enforced or Involuntary Disappearances; see the report of the sessional working group on the administration of justice, E/CN.4/Sub.2/1996/16, para. 38.

[89] This norm further develops article 17 of the Declaration and is supported by the general comment issued by the Working Group on Enforced or Involuntary Disappearances relating to this issue (see E/CN.4/2001/68, paras. 25-32).

[90] See the comments of the Working Group on Enforced or Involuntary Disappearances on the draft convention (E/CN.4/2001/68, annex III).

[91] See Andreu-Guzman, note 37 above, p. 96.

[92] See note 85 above; only 13 States and 8 NGOs sent their comments on the draft convention.

[93] For instance, article 5, which prohibits the imposition of the death penalty on perpetrators of the offence of forced disappearance "in any circumstances".

[94] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), hereinafter "the First Geneva Convention"; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), hereinafter "the Second Geneva Convention"; Geneva Convention relative to the Treatment of Prisoners of War (1949), hereinafter "the Third Geneva Convention"; Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), hereinafter "the Fourth Geneva Convention"; Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), hereinafter "Additional Protocol I"; Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), hereinafter "Additional Protocol II". The Geneva Conventions have attracted nearly universal ratification, with currently 189 States Parties. Additional Protocol I has been ratified by 159 States, and Additional Protocol II by 151 States. On the Geneva Conventions see, inter alia, International Committee of the Red Cross (ICRC) (Jean Pictet et al.), Commentary on the Geneva Conventions of 12 August 1949, 4 volumes, Geneva 1952-1966; ICRC (Jean Pictet et al.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Dordrecht 1987; Frits Kalshoven and Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law, 3rd edition, Geneva 2001.

[95] The Statute of the International Criminal Court (A/CONF.183/9) was adopted in Rome on 17 July 1998 and has been ratified so far by 47 States. It needs 60 ratifications to enter into force. Hereinafter "ICC Statute". On war crimes, see article 8. On the ICC see paras. 66 et seq., below. See also, inter alia, Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History, New York 1998; Triffterer, note 2 above; Antonio Cassese, International Criminal Law - A Commentary on the Rome Statute for an International Criminal Court, Oxford University Press 2001.

[96] Fourth Geneva Convention, article 4, and Additional Protocol I, article 50.

[97] First Geneva Convention, article 12; Second Geneva Convention, article 12; Third Geneva Convention, article 13; Fourth Geneva Convention, article 27; Additional Protocol I, article 75 (1); common article 3 to the four Geneva Conventions; Additional Protocol II, article 4 (1).

[98] First Geneva Convention, article 12; Second Geneva Convention, article 12; Third Geneva Convention, article 13; Fourth Geneva Convention, article 32; Additional Protocol I, article 75 (2) (a) (i); common article 3 (1) (a) to the four Geneva Conventions; Additional Protocol II, article 4 (2) (a).

[99] ICC Statute, article 8 (2) (a) (i) and (c) (i).

[100] First Geneva Convention, article 12; Second Geneva Convention, article 12; Third Geneva Convention, article 13; Fourth Geneva Convention, article 32; Additional Protocol I, article 75 (2) (a) (ii); common article 3 (1) (a); Additional Protocol II, article 4 (2) (a).

[101] First Geneva Convention, article 50; Second Geneva Convention, article 51; Third Geneva Convention, article 130; Fourth Geneva Convention, article 147; ICC Statute, article 8 (2) (a) (ii) and (c) (i).

[102] ICC Statute, article 8 (2) (b) (xxi) and c (ii).

[103] Third Geneva Convention.

[104] Idem.

[105] Fourth Geneva Convention.

[106] Third Geneva Convention, articles 99-108; Fourth Geneva Convention, articles 27, 30-33, 37, 38, 71-76, 126.

[107] Additional Protocol I, article 75.

[108] Third Geneva Convention, article 130; Fourth Geneva Convention, article 147; ICC Statute, article 8 (2) (a) (vi).

[109] Additional Protocol II, article 4 (2) and 5.

[110] Article 3 (I) (d) common to the four Geneva Conventions prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

[111] Additional Protocol II, article 6.

[112] ICC Statute, article 8 (2) (c) (iv).

[113] Fourth Geneva Convention, article 25.

[114] Fourth Geneva Convention, article 26.

[115] Additional Protocol I, article 74.

[116] Third Geneva Convention, articles 70 and 71.

[117] Fourth Geneva Convention, articles 106 and 107.

[118] Additional Protocol II, article 5 (2) (b).

[119] Additional Protocol I, article 32.

[120] See ICRC, Commentary on the Additional Protocols of 8 June 1977, note 94 above, p. 345, para. 1211.

[121] Ibid., p. 350, para. 1224.

[122] Additional Protocol I, article 33 (2). Apart from protected persons within the meaning of the Fourth Geneva Convention, the duty to record information about and search for extends to nationals of a State not party to the fourth Convention, nationals (other than those in occupied territory) of a State not party to the conflict which has normal diplomatic representation in the detaining State, and nationals of a co-belligerent State which has diplomatic representation in the detaining State.

[123] Third Geneva Convention, article 122; Fourth Geneva Convention, article 136.

[124] Third Geneva Convention, article 123; Fourth Geneva Convention, article 140. In 1961, the Central Information Agency became the Central Tracing Agency.

[125] See United Nations General Assembly resolution 3220 (XXIX) of 6 November 1972, para. 2; 24th International Conference of the Red Cross, Resolution II, 1981; 27th International Conference of the Red Cross and Red Crescent, Plan of Action for the Years 2000-2003, 1999, actions proposed for final goal 1 (1), para. e.

[126] Statutes of the International Red Cross and Red Crescent Movement, article 5.

[127] Fourth Geneva Convention, articles 24 and 50; Additional Protocol I, article 78 (3).

[128] Additional Protocol I, article 78 (1).

[129] Additional Protocol I, article 74; Additional Protocol II, article 4 (3) (b).

[130] Additional Protocol I, article 77 (5); Additional Protocol II, article 6 (4).

[131] See Hall, note 2 above.

[132] Ibid., p. 498.

[133] On impunity, see Naomi Roth-Arriaza, Impunity and Human Rights in International Law and Practice, New York 1995; Kai Ambos, Impunidad y Derecho Penal Internacional, 2nd edition, Buenos Aires 1999; Louis Joinet, in Le refus de l'oubli, note 71 above, p. 295, and his revised final report to the Sub-Commission on the question of the impunity of perpetrators of human rights (civil and political), E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

[134] See Tayler, note 3 above, pp. 65 et seq.; Le refus de l'oubli, note 71, above.

[135] See OAS document AG/Res.666 (XIII-0/83), para. 4.

[136] See United Nations Security Council resolutions 827 (1993) of 25 May 1993, and 955 (1994) of 8 November 1994. See, inter alia, John R.W.D. Jones. The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, New York 2000, with further references.

[137] See Yearbook of the International Law Commission, 1996, vol. II (Part Two), page 47, commentary on article 18 - Crimes against humanity.

[138] See note 95, above.

[139] See report of the Preparatory Commission, PCNICC/2000/1/Add.2.

[140] The word "detained" would include a perpetrator who maintained an existing detention.

[141] It is understood that under certain circumstances an arrest or detention may have been lawful.

[142] This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

[143] It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.

[144] See in this respect Olivier de Frouville, "Les disparitions forcées", in Hervé Ascensio, Emmanuel Decaux and Alain Pellet, Droit international pénal, Paris 2000, p. 377.

[145] This violation derives from the fact that acts of enforced disappearance are aimed at removing the victim from the protection of the law.

[146] This violation derives from the fact that every incommunicado detention for a prolonged period as such, irrespective of possible torture or ill-treatment during detention, constitutes inhuman or degrading treatment to both the disappeared person and his (her) relatives.

[147] Experience, e.g. in the Working Group, shows that the vast majority of all reported cases of enforced disappearance in fact lead to the death of the victim, sometimes immediately, sometimes only after months or years of incommunicado detention and torture.

[148] See the general comment of the Working Group on article 4 of the Declaration (E/CN.4/1996, paras. 54-58).

[149] See paragraph 6 of the methods of work of the Working Group, note 31 above.

[150] See E/CN.4/Sub.2/1996/16, para. 46, and E/CN.4/Sub.2/1998/19, para. 22; see also Andreu-Guzman, note 37 above, pp. 82 et seq.

[151] See ICC Statute, article 7.2 (I); also note 144, above.

[152] See Nowak, note 33 above, pp. 161 et seq.

[153] Ibid., pp. 282 et seq.

[154] In the recent judgement of Bámaca Velásquez v. Guatemala, note 52 above, the Inter-American Court of Human Rights for the first time dealt with this right in a disappearance case and arrived at the conclusion that the violation of the right to the recognition of juridical personality in the sense of article 3 of the American Convention on Human Rights "presumes an absolute disavowal of the possibility of being a holder of such rights and obligations" (para. 179) which is not the case with an act of enforced disappearance. It, therefore, held that this right was not violated.

[155] Kurt v. Turkey, note 58 above.

[156] See all the cases reviewed in chapter IV.A.1; see also Nowak, note 33 above, p. 187. In Mojica v. Dominican Republic, note 39 above, the Committee came to the general conclusion that "the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7".

[157] See the cases reviewed in chapter IV.A.3. In Tas v. Turkey, note 60 above, the court for the first time recognized this inconsistency by stating that it did not consider it appropriate "to make any finding under this provision concerning the effect the incommunicado detention might have had on Muhsin Tas".

[158] Caballero-Delgado and Santana v. Colombia, note 48 above.

[159] See the case of Matanovic v. RS, Case No. CH/96/1, Decision on the Merits of 6 August 1997, and the concurring opinion of Manfred Nowak. See also Manfred Nowak, "The Human Rights Chamber for Bosnia and Herzegovina adopts its first judgements", Human Rights Law Journal, vol. 18 (1997), p. 174 (p. 177).

[160] Palic v. RS, note 66 above.

[161] Quinteros Almeida v. Uruguay, note 36 above.

[162] Blake v. Guatemala, note 50 above.

[163] See the judgements reviewed in chapter IV.A.3 above.

[164] Tas v. Turkey, note 60 above.

[165] Palic v. RS, note 66 above. In Unkovic v. the Federation of Bosnia and Herzegovina, note 67 above, the father of a disappeared family was found a victim of article 3 of the European Convention although he had submitted the application only on his own behalf.

[166] See chapter V.E above.

[167] See the amicus curiae brief of the ICJ, note 53 above, pp. 130 et seq.

[168] Quinteros Almeida v. Uruguay, note 36 above.

[169] See chapter V.E.2 above.

[170] See the draft "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" prepared by Theo van Boven and Cherif Bassiouni in the context of the Commission and Sub-Commission: E/CN.4/Sub.2/1993/8; E/CN.4/1997/104; E/CN.4/2000/62. These principles are still under consideration by the Commission. See also Theo van Boven, "The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", in Gudmundur Alfredsson and Peter MacAlister-Smith (eds.), The Living Law of Nations, Kehl/Strasbourg/Arlington 1996, p. 339; Manfred Nowak, "The right of victims of gross human rights violations to reparation", in Fons Coomans and others (eds.), Rendering Justice to the Vulnerable, The Hague 2000, p. 203.

[171] See, in particular, the case law of the European Court of Human Rights in relation to articles 2 and 3 of the European Convention on Human Rights, note 60 above.

[172] See, in particular, the case law of the Inter-American Court of Human Rights in relation to article 1 of the American Convention on Human Rights, note 46 above.

[173] See, in particular the case law of the Human Rights Committee in relation to article 2.3 of the International Covenant on Civil and Political Rights and of the European Court of Human Rights in relation to article 13 of the European Convention, notes 40 and 59 above.

[174] See, in particular, the case law of the Human Rights Chamber for Bosnia and Herzegovina in relation to article XI of Annex 6 to the Dayton Peace Agreement and of the Inter-American Court of Human Rights in relation to article 63 of the American Convention on Human Rights, notes 66 and 49 above.

[175] See Commission on Human Rights resolution 2001/46 of 23 April 2001.

[176] See chapter VI above.

[177] E/CN.4/1983/14, para. 141; E/CN.4/1986/18/Add.1, paras. 55-58; E/CN.4/1989/18/Add.1, para. 136; E/CN.4/1990/13, para. 346; E/CN.4/1991/20, para. 409 and Add.1, para. 167; E/CN.4/1992/18, para. 371 and Add.1, para. 204 (d); E/CN.4/1997/34, paras. 24-30.

[178] See note 170 above.

[179] See chapter VIII.C.2 above.

[180] Bautista v. Colombia, note 40 above.

[181] In addition to the relevant provisions in the United Nations Declaration, the Inter-American Convention on Forced Disappearance of Persons and the draft convention, see also the decision of the Human Rights Committee in Hugo Rodriguez v. Uruguay (Comm. No. 322/1988, final views of 19 July 1994) holding that amnesties for gross violations of human rights are incompatible with State obligations under the International Covenant on Civil and Political Rights.

[182] See, for example, the efforts of the High Representative for Bosnia and Herzegovina to establish a memorial for the victims of arbitrary executions and enforced disappearances in Srebrenica.

[183] See, for example, the legislative changes adopted by Bolivia and submitted as a guarantee of non-repetition to the Inter-American Court of Human Rights in the Trujillo Oroza case, note 56 above.

[184] See in particular note 49 above; see also Nowak, note 170, pp. 212 et seq.

[185] See Guest, note 11 above; the case of the disappearance of an Argentinian child, note 42 above; the "Study on the situation of children of disappeared persons separated from their parents and reclaimed by members of their legitimate families", in Annual Report of the Inter-American Commission on Human Rights 1987-1988, OEA/Ser.L/V/II.74, Doc.10 Rev.1, of 16 September 1998, p. 349; the report of Theo van Boven to the Sub-Commission, E/CN.4/Sub.2/1993/8; and already the first report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1435 of 22 January 1981, paras. 170-172.

[186] Adopted in The Hague on 25 October 1980.

[187] See article 25 of the draft convention, which envisages the establishment of a "Committee against Forced Disappearance" consisting of 10 experts.

[188] See articles 27, 28 and 31 of the draft convention, which all contain the possibility of visits to the territory of States parties.

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